In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 454

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, PETITIONERS

v.

MARIE ELIZABETH ELG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM ON BEHALF OF PETITIONERS

A. During the course of the argument of the above-entitled cause on February 3, 1939, a request was made by the Court to be advised of the positions previously taken by the executive branch of the Government with respect to the questions involved in this case.

1. In particular the Court requested a copy of the letter of Mr. Wilbur J. Carr, Assistant Secretary of State, to the Attorney General, dated October 7, 1931, concerning the case of Ingrid Therese Tobiassen.

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The only relevant part of that letter, stating the uniform construction by the Department of State of Section 2 of the Act of March 2, 1907, and of the naturalization treaties, has been quoted in petitioners' Reply Brief, pp. 2–3. The entire letter is set forth, *infra*, Appendix A. As the letter shows, it was accompanied by two enclosures, which are also set forth, *infra*, Appendix A. One of these, an excerpt from a Department of State memorandum of August 17, 1926, concerning the case of one Baldura Schmidt, also discusses some of the State Department authorities interpreting the naturalization treaties as applicable to the expatriation of a minor acquiring derivative citizenship through the act of a parent (see original Brief for the Petitioners, pp. 29–35).

2. This letter is significant because it again indicates that, contrary to the contention of respondent Elg (Br. 42–45), the statement in Attorney General Mitchell's opinion in the *Tobiassen* case, that Miss Tobiassen had acquired Norwegian nationality upon going to Norway with her father, was not hasty or ill-considered. The communication of the Department of State of October 7, 1931, shows, in its last paragraph (*infra*, Appendix A) that the legation at Oslo was instructed to ascertain from the Norwegian authorities whether Miss Tobiassen was regarded as a naturalized Norwegian subject. In his opinion, the Attorney General recited this fact and also the fact that the Norwegian Foreign

Office had informed the American Legation that Miss Tobiassen acquired Norwegian citizenship if she were living with her father when he took up his residence in Norway, under the Norwegian law of April 21, 1888 (see 36 Op. A. G. at 536, 537). As indicated in the Government's original Brief for the Petitioners, pp. 37–38, Attorney General Mitchell's opinion relies upon this statement by the Norwegian Foreign Office.

3. In the present case, a similar inquiry was made of the Swedish Foreign Office. The letter of R. B. Shipley, Chief of Passport Division, to Miss Elg, referred to a communication of October 30, 1934, from the Swedish Ministry for Foreign Affairs to the American Legation at Stockholm, holding that Mr. Elg recovered Swedish nationality by resuming his residence in Sweden and remaining there for two years, and that if Miss Elg were residing with him she also acquired Swedish nationality under Swedish law (see R. 17). This is diplomatic correspondence which may come within the intent of the Court's request, and it is accordingly printed *infra*, Appendix B. A certified copy, and the letter of transmittal from the State Department, is being filed with the Clerk of this Court.

4. In order fully to inform the Court of the positions taken by the executive departments of the Government, there is set forth in Appendix C, *infra*, the communication of the Department of Labor dated August 11, 1931, requesting the opin-

ion of the Attorney General in the *Tobiassen* case, and enclosing a memorandum of that date signed by the Solicitor of the Department of Labor, expressing the view that Miss Tobiassen had not lost her American citizenship.

Inquiry was made of the Department of Labor as to its administrative practice with respect to persons situated as is respondent, Miss Elg. Accompanying a letter dated February 7, 1939, from Mr. Gerard D. Reilly, Solicitor of Labor, for the Secretary of Labor, to the Solicitor General, is a memorandum by Mr. T. B. Shoemaker, Deputy Commissioner of Immigration and Naturalization, indicating that, prior to the opinion of the Attorney General in the Tobiassen case, the administrative view of the Department of Labor was to regard persons like respondent as American citizens. This memorandum is printed infra, Appendix D. In the original Brief for the Petitioners (p. 38), attention was called to the difference of opinion between the Labor Department and State Department which was resolved by the Attorney General.

B. The Government takes this opportunity to respond to the contention disclosed upon the reply argument of plaintiff Elg and based upon a "note" to Article 8 of the Swedish Law of October 1, 1894. For the sake of convenience that "note" is reprinted *infra*, Appendix E. The "note" is not part of the law, but is merely a general annotation

contained in one volume.[1] It states that the Article "as is clear from its wording, only bore application in the case of a person who had been a Swedish citizen." Obviously, this reference is merely to *the principal coverage of the Article, under the first and second paragraphs,* avoiding the statelessness of a person resident in Sweden "who has forfeited Swedish citizenship." The note was not intended to suggest that if such a person did recover his former Swedish citizenship under Article 8, his minor children became Swedish citizens only if they, too, had formerly been Swedish citizens. Nothing in the clear wording of Article 8 suggests such a construction. This construction would mean that minor children born abroad without Swedish nationality would be left stateless if they were expatriated by their country of birth when they were brought to Sweden by their parents.

C. Mr. Justice Stone inquired whether the Treaty with Sweden could have the effect of expatriating respondent Elg, born with sole United States citizenship, in view of the limitation in Article III to citizens of one state who become recognized citizens of another state and then return to their original country. A full answer to the question involves consideration of the interrelation of the various treaty provisions.

[1] It is not contained in the volume of laws published in 1910, "Consular Statute Book of Sweden," but contained only in "Statute Book for Legations and Consulates" published in 1931, after the law had ceased to be operative (January 1, 1925).

The Treaty with Sweden, like all the other naturalization treaties, contains a crucial provision recognizing the doctrine of expatriation, the conflict over which had previously led to international disputes. That provision is Article I of the Convention with Sweden, and provides that citizens of one state who become citizens of the other state, during a five-years' residence, shall be recognized by the former state as citizens of the latter state. Qualifying the obligation of the former state is Article III, which provides that if such person returns and applies to be restored to his former citizenship, the former state may receive him as a citizen. However, Article III does not limit the operation of Article I except to provide that a citizen of one country who is naturalized in another country and thus loses his original citizenship (under Article I) may be taken back into his native country if he returns there to reside.

Article III of the Protocol to the Convention contains a further, nonreciprocal provision. It prescribes that if a Swede who has become a naturalized citizen of the United States renews his residence in Sweden without intent to return to America (which may be shown affirmatively or by failure to rebut a presumption arising from two years residence in Sweden), he renounces his American citizenship. This renunciation of American citizenship would be effective whether or not Sweden exercised her right (under Article III) to admit him to Swedish citizenship. Thus, it has happened

that a German who became naturalized in the United States and returned to Germany to live lost his American citizenship, under a treaty provision substantially the same as Article III of the Protocol to the Swedish treaty, although at the same time he did not resume his German nationality, and thus was put in a status of statelessness.[2]

Accordingly, under Article III of the Protocol, Mr. Gustav Elg, a Swede naturalized in the United States, lost his American citizenship when he returned to Sweden without the intent to return to the United States. However, Article 8, par. 2, of the Swedish Law of October 1, 1894, drafted so as to prevent the treaty from resulting in the statelessness which occurred in Germany, provided that Mr. Elg thereby reacquired Swedish citizenship. Under Article 8, par. 3, of this law, according to the Government's understanding, Miss Elg, then resident in Sweden, also became a Swedish citizen.

The result of Miss Elg's becoming a Swedish citizen was that she lost her American citizenship—not under Article III of the protocol, as did her father, but under Article I of the Convention itself, which provides that United States citizens who, during five years' residence in Sweden, "have become and are lawfully recognized as citizens of

[2] See original Brief for the Petitioners, p. 52, note 47, referring to 3 Moore, Int. Law Digest, 749, which discusses German Foreign Office to Mr. Kasson, American Min., Dec. 31, 1884, For. Rel. 1885, 393; Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, Feb. 7, 1885, *id.*, 399, 400; Count Hatzfeldt to Mr. Coleman, May 16, 1885, *id.*, 417.

Sweden" shall be treated as such by the United States. Moreover, in so far as the treaty is concerned, she did not lose her American citizenship solely because her father lost his American citizenship. She lost her American citizenship because she both (1) acquired Swedish citizenship (when her father acquired Swedish citizenship), and (2) *resided for five years in Sweden*. This five-year residence in Sweden is an independent factor which was not a condition of the loss of American citizenship by Mr. Elg under Article III of the Protocol, and was a condition of the loss of American citizenship by Miss Elg under Article I of the Convention, a condition which was satisfied in this case.[3]

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

FEBRUARY 1939.

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[3] It does not affect the result in this case whether, for purposes of Article I of the Convention, Miss Elg's residence in Sweden started in 1911 when she arrived with her mother (in which event she lost her American citizenship in 1924 when she acquired her Swedish citizenship), or whether her "residence" in Sweden started in 1922 when her father moved to Sweden and established a domicile there (in which event she lost her American citizenship under Article I in 1927, or three years after her father lost his American citizenship under Article III of the Protocol).

APPENDIX A

DEPARTMENT OF STATE,
Washington, D. C., October 7, 1931.

In reply refer to Le 130–Tobiassen, Ingrid Therese.

The Honorable THE ATTORNEY GENERAL.

SIR: The Department has received your letter of September 22, 1931, concerning the question of the citizenship of Ingrid Therese Tobiassen, who applied for a passport of the United States in April last and was denied a passport, in a letter of April 9, 1931, because it appeared that she had lost her United States citizenship through naturalization in Norway, in which country she had resided from 1919 to 1929. She applied for a passport for use in visiting Norway, but alleged that her permanent residence was in this country, and that she intended to return to the United States within one year. It appears that, after receiving the letter just mentioned, Miss Tobiassen applied to the Department of Labor for a reentry permit, as an alien, under the provision of Section 10 of the Immigration Act of May 26, 1924, but that the Department of Labor considers that she is still a citizen of the United States and therefore is not entitled to a return permit. The question whether she has lost her United States citizenship was submitted to you by the Department of Labor in a letter of August 11, 1931, accompanied by a memorandum of the Solicitor for the Department of Labor of the same date.

Enclosed herewith is a copy of this Department's letter of April 9, 1931, mentioned above, and it will be observed that the ruling of this Department that

Miss Tobiassen had ceased to be a citizen of the United States was based upon the understanding that she had been naturalized as a Norwegian subject, under the provision of Section 6 of the Norwegian nationality law of August 8, 1924, through her father's naturalization as a Norwegian subject, under Section 4 of the same Act, resulting from his reacquisition of a residence of a permanent character in Norway. Translations of the Norwegian statutory provisions just mentioned are quoted in full in the Department's letter of April 9.

This Department has for many years uniformly held that former citizens of the United States who have been naturalized during minority in foreign States through the naturalization of their parents must be regarded as having lost their American nationality under the provision of Section 2 of the Act of Congress of March 2, 1907 (34 Stat. 1228) "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws"; also that the provisions contained in the naturalization treaties between the United States and other countries, including the naturalization treaty of May 26, 1869, with Norway and the Protocol of the same date, are applicable to the cases of persons naturalized during minority through the naturalization of their parents, as well as to the cases of persons naturalized after attainment of majority upon their own applications. In this connection I enclose, for your information, an excerpt from a memorandum of the Solicitor, dated August 17, 1926, concerning the case of one Baldura Schmidt, a native of this country who was naturalized as a German subject through the naturalization of her

father. As indicated therein, this Government has insisted that persons of foreign birth who have been naturalized as citizens of the United States during minority through the naturalization of their parents should not be held for the performance of military service in the foreign countries from which they came upon the ground that, notwithstanding their naturalization in the United States, they retained their original nationality and the obligations attendant thereupon. This Department has contended that their naturalization should be regarded as complete, and that such persons should not be regarded as having a dual allegiance.

If it is true, as assumed in this Department's letter of April 9, 1931, and as apparently conceded by the Department of Labor, that Miss Tobiassen was naturalized as a Norwegian subject, through the naturalization of her father as such, it is this Department's opinion that she should be regarded as an alien. However, in view of the importance of the question, it seems desirable to ascertain definitely from the Norwegian authorities whether Miss Tobiassen is regarded as having been naturalized as a Norwegian subject. An instruction is therefore being sent to the Legation at Oslo to obtain this information, and, upon the receipt of a reply, you will be duly advised.

Very truly yours,

For the Secretary of State:

(Sgd.) WILBUR J. CARR,
Assistant Secretary.

Enclosures:

From Department to Miss Tobiassen, April 9, 1931; Excerpt from memorandum of August 17, 1926.

APRIL 9, 1931.

In reply refer to 130–Tobiassen, Ingrid Therese.

Miss INGRID THERESE TOBIASSEN,

130 Hodge Road, Princeton, New Jersey.

MADAM: The Department has received the passport application which was executed by you in the Passport Agency at New York City on April 1, 1931. It appears that you were born in the United States on February 15, 1911; that your father, Mr. G. M. Tobiassen, was born in Norway and that your father was naturalized a citizen of the United States by the United States District Court for the Southern District of New York at New York City on February 20, 1912. It further appears that in 1919 your parents returned to Norway where they have since resided and that you resided in Norway with your parents until 1929.

Your attention is invited to the following provisions of Articles I and III of the Naturalization Treaty between the United States and Sweden and Norway of June 14, 1871, and Article III of the Protocol thereto:

> ARTICLE I. Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the Government of the United States to be Swedish or Norwegian citizens, and shall be treated as such. * * *
>
> ARTICLE III. If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored to his former citizenship, the govern-

ment of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper.

ARTICLE III. Relating to the third article of the convention.

It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the Government of the United States to have renounced his American citizenship.

The intent not to return to America may be held to exist when the person so naturalized resides more than two years in Sweden or Norway.

Your attention is also invited to Sections 4 and 6 of the Norwegian Nationality Law of August 8, 1924, which in translation read as follows:

SECTION 4. Any person who is a natural born Norwegian subject, and who has ceased to be a Norwegian subject, will again become a Norwegian subject by taking up his regular domicile in Norway. If, however, he ceases to be a Norwegian subject through acquiring a foreign nationality, or if he later acquired foreign nationality, he will not again be deemed to be a Norwegian subject until he has ceased to be of foreign nationality.

SECTION 6. When a person becomes a Norwegian subject in pursuance of Section 2 or of Section 4, his wife, and unmarried children under eighteen years of age, born in wedlock, shall also be deemed to be Norwegian subjects, provided they reside in Norway. If they do not reside there, and the wife subsequently, the marriage being in

force, or the children, being unmarried and under eighteen years of age, take up his (their) residence in Norway, he (they) shall then be deemed to be Norwegian subjects provided the husband still is a Norwegian subject.

In view of the circumstances of your case as set forth in your passport application and of the provisions of the treaty and Norwegian Law quoted above the Department is obliged to consider that your father has reacquired Norwegian nationality; that you became a Norwegian National through his reacquisition of Norwegian Nationality and that accordingly you have ceased to be an American citizen and are not entitled to receive a passport of this Government.

The passport fee of $5.00 which accompanied your application under acknowledgement is returned herewith.

Very truly yours,

R. B. SHIPLEY,
Chief, Passport Division.

Enclosure:
Check for $5.00.

[Excerpt]

AUGUST 17, 1926.

NATIONALITY OF A NATIVE AMERICAN WHO HAS BEEN NATURALIZED IN A FOREIGN COUNTRY THROUGH THE NATURALIZATION OF A PARENT

CASE OF BALDURA SCHMIDT

* * * * *

In an instruction of March 6, 1899, to the Minister to Belgium, Secretary Hay said, with reference

to the status of a person who had been naturalized through the naturalization of his father as a citizen of this country:

> A person properly claiming naturalization under this statute (2172 R. S.) is as completely naturalized as if he had complied with conditions of the general naturalization laws of the United States, and would not, if he left the jurisdiction of the United States, have to comply with the requirements of Revised Statutes 2167, by taking out naturalization papers for himself. (For. Rel. 1899, 87, 3 Moore's Digest, 470.)

With reference to the status of one Anton Macek, Secretary Hay made the following statement, in an instruction of January 22, 1900, to the American Minister to Austria-Hungary:

> It is not necessary that naturalization should be a strictly judicial act, as in the case of the original naturalization of an alien father. The minor son is just as much naturalized by the fact of being within the jurisdiction of the United States at the time of the father's naturalization, or coming within that jurisdiction subsequently during minority, as if he himself had been admitted to citizenship by a decree of the court. * * *
>
> The view that citizenship acquired by a minor through the parent's naturalization is in effect a process of naturalization according to law, obtains in applying the German-American naturalization treaties, where evidence that a minor child has acquired citizenship through the father, according to the laws of the United States, coupled with evidence that the minor had resided at least five years in the United States, are taken to ful-

> fill the conditions of the treaty—that is, in effect, to show that the minor child has been naturalized according to law. (3 Moore's Digest, 472.)

The question under consideration was discussed at considerable length in the case of John Haberacker, a native of Bavaria, whose mother, after becoming a widow, married one Andrew Knauss, a naturalized American citizen of Bavarian origin. This Government insisted that the German Government should recognize the naturalization of John Haberacker through his mother's naturalization, which resulted from her marriage to an American citizen. In this relation attention was called to the decision of one of the circuit courts of appeals in the *United States* v. *Kellar,* 13 Fed. 82, in which it was held that a minor in similar circumstances was naturalized as a citizen of the United States. In an instruction of March 26, 1891, to the Minister to Germany, concerning this case, Acting Secretary Wharton said:

> In consideration of the uncontradicted opinion of the supreme courts of two of our greatest States and the decision of one of the justices of the Supreme Court of the United States upon this point, it is believed that the Royal Bavarian Government will accept this interpretation as correct in the premises and readily assent to treat Haberacker as an American citizen. (For. Rel. 1891, 507; 3 Moore's Digest 478.)

It is interesting to observe that the German authorities in the Haberacker case did not deny that minor children of German origin in general, who were naturalized as citizens of the United States through the naturalization of their parents should

be recognized as having acquired American citizenship and as having lost their German nationality. The contention of the German authorities was simply that acquisition of American citizenship by a minor through his mother's acquisition of such citizenship by marriage could not properly be regarded as naturalization.

It is quite true that the naturalization treaties between the United States and German States have been abrogated, so that it can not properly be held that Baldura Schmidt lost her American citizenship under any treaty provision.[1] However, it is believed that her case comes squarely within the purview of the provision of Section 2 of the Expatriation Act of March 2, 1907, that: "Any American citizen shall be deemed to have expatriated himself when he has been naturalized in a foreign State in conformity with its laws." It is entirely clear from the statement of the German Foreign Office, mentioned above that Baldura Schmidt was naturalized in Germany "in conformity with its laws," through her father's naturalization as a German subject.

Not only does the case of Baldura Schmidt appear to come within the letter of the second paragraph of Section 2 of the Expatriation Act of March 2, 1907, but it is believed that it also comes within the spirit of this statute. The naturaliza-

[1] Nevertheless Article 278 of the Treaty of Versailles, the benefit of which accrues to the United States under its Treaty of Peace with Germany, requires Germany to recognize the naturalization of Germans in this country "pursuant to naturalization laws" as having "in all respects severed their allegiance to their country of origin."

tion of minor children through the naturalization of their parents is provided for, in one form or another, in the laws of all countries. One of the first important laws passed by the First Congress of the United States was the Naturalization Act of March 26, 1790, and this statute made provision for the naturalization of minor children dwelling within the United States, through the naturalization of their parents. This law has been modified as to certain details from time to time, but the general principle of the naturalization of minor children through the naturalization of their parents has been retained from the beginning. The last change in the law was made in Section 5 of the Citizenship Act of March 2, 1907, the object of which was to make it a condition of the naturalization of minor children that they should have taken up a residence of a permanent character in this country. These statutes are all based upon the ancient legal concept of the solidarity of the family, which involves the legal principles of the right of parents to control and their duty to guard and provide for minor children whom they have brought into the world. It would be a manifest absurdity for this Government to insist upon its right to confer American naturalization upon the minor children of aliens naturalized in this country and at the same time to deny the right of foreign countries to naturalize minor children of American origin through the naturalization of their parents. It might be contended that this Government could recognize the naturalization of Baldura Schmidt as a German subject, while at the same time holding that she has not lost her American nationality. This, however, would be contrary to the position

that this Government has maintained for many years with regard to the status of naturalizd citizens, namely, that naturalization involves not only the acquisition of a new nationality but the loss of former nationality.

This Department for years past has uniformly held that the naturalization of an American minor child in a foreign country through his father's naturalization resulted in a loss of American nationality. It would seem to be reasonable that such a person, upon reaching his majority, should be able to reacquire American nationality through some simple process, after reestablishing a residence in the United States. This, however, would require special legislation.

For the reasons mentioned above, and in view of the numerous precedents mentioned, it is believed that a passport should be denied to Baldura Schmidt upon the ground that she lost her American citizenship, under the provision of Section 2 of the Act of March 2, 1907, when she was naturalized as a German subject through the naturalization of her father.

APPENDIX B

TRANSLATION

MINISTRY FOR FOREIGN AFFAIRS.

By a note of the 17th of this month the Legation of the United States of America requested of the Ministry for Foreign Affairs certain information regarding the nationality of Miss Marie Elisabeth Elg and her Father, Mr. Gustav Elg.

In reply to this request, the Ministry has the honor to communicate the following:

According to the provisions of the convention concluded May 26, 1869, with the United States of America concerning the nationality of emigrants and the additional protocol to the aforementioned convention, as well as the provisions of Article 8, Paragraph 2, of the law of October 1, 1894, concerning the acquisition and loss of Swedish nationality, Mr. Elg recovered Swedish nationality when he again took up his residence in Sweden and was domiciled there for a period of two years. If Miss Elg was domiciled in Sweden at the time her father regained his Swedish nationality, she acquired Swedish nationality at the same time as her father (Article 8, Paragraph 3, of the aforementioned law).

Stockholm, October 30, 1934.

To the Légation of the United States of America,
Stockholm.

APPENDIX C

DEPARTMENT OF LABOR,
OFFICE OF THE SECOND ASSISTANT SECRETARY,
Washington, August 11, 1931.

8-249
Permit #755394

Honorable WILLIAM D. MITCHELL,
The Attorney General.

MY DEAR MR. ATTORNEY GENERAL: I have the honor to request that you furnish me with your opinion on the citizenship status of Miss Ingrid Therese Tobiassen, who has applied to this Department for a return permit under the provisions of Section 10 of the Immigration Act of May 26, 1924 (43 Stat. 161; 8 U. S. C. 213). Miss Tobiassen is now twenty years of age and was born in New York City on February 15, 1911. Her father was born in Norway and became a citizen of the United States by naturalization on February 20, 1912, in the United States District Court for the Southern District of New York. It appears that in 1919 Miss Tobiassen, who was then about eight years old, was taken by her parents to Norway and the parents have since resided in that country. In 1929, at the age of eighteen years, Miss Tobiassen returned to the United States and so far as the record indicates has taken up her permanent residence in the City of Princeton, State of New Jersey. Her purpose in asking for a reentry permit is that she may visit her parents in Norway. From a letter in the file of this Department, it appears that the Passport Division of the Depart-

ment of State has declined to issue a passport to Miss Tobiassen on the ground that she has acquired Norwegian nationality and has ceased to be an American citizen, basing this decision on certain articles of the naturalization convention between the United States and Sweden and Norway of June 14, 1871, and, for the further reason, because of certain provisions of the Norwegian nationality law of August 8, 1924, quoted in the letter of that Department to Miss Tobiassen, dated April 9, 1931, which may be found in the Department's file.

It is the view of the Solicitor for this Department that Miss Tobiassen has not lost her American citizenship by reason of the fact that her parents took up permanent residence in Norway and that at the most Miss Tobiassen should be held to be a citizen of the United States and a subject of Norway under Norwegian law. Because of the importance of this question in the administration of the immigration laws, your opinion is respectfully requested on the question of the citizenship status of Miss Tobiassen at this time. In accordance with the usual practice, and under your rules, the written opinion of the Solicitor for this Department is being forwarded herewith. The Department's file is also inclosed and I will thank you to return that file when it has served its purpose.

I am, Sir, with great respect,

Very sincerely yours,

(sgd.) W. W. HUSBAND,
W. W. Husband,
Second Assistant Secretary.

Inclosure
#17171

8-249
Permit #755394

AUGUST 11, 1931.

MEMORANDUM FOR THE SECOND ASSISTANT SECRETARY.

In re citizenship status of Ingrid Therese Tobiassen

By direction of the Second Assistant Secretary the question has been submitted to this office as to the citizenship status of Ingrid Therese Tobiassen. The question arises by reason of the filing of an application for reentry permit under Section 10 of the Immigration Act of May 26, 1924 (43 Stat. 161; 8 U. S. C. 213). From this application it appears that the young woman in question was born in New York City on February 15, 1911, and she gives her present place of permanent residence as being in the United States at Princeton, New Jersey. She desires to visit her parents, who are residing in Norway. A letter in this file from the Norwegian America Line Agency, Inc., to the Congressional Information Bureau of this city indicates that the young woman resided in Norway for some time with her parents and was readmitted to the United States in April 1929 as a United States citizen. Recently, it appears, she applied for a passport from the Department of State, but this was refused on the ground that she acquired Norwegian nationality and had ceased to be an American citizen. In the file is a letter to this young woman from the chief of the Passport Division of the Department of State to the effect that because her father, after having been naturalized as a citizen in the United States, returned to Norway, his native country, and has resided therein since 1919,

he has lost his American citizenship and has reacquired his original Norwegian nationality. The chief of the Passport Division states that because of Articles I and III of the Naturalization Treaty between the United States and Sweden and Norway of June 14, 1871, and Article III of the Protocol thereto, and by reason of Sections 4 and 6 of the Norwegian Nationality law of August 8, 1924, the father of this family having reacquired Norwegian nationality, the young woman in question has also taken Norwegian nationality through the reacquisition of Norwegian nationality by the father, and accordingly has ceased to be an American citizen and is not entitled to receive a passport from the United States Government.

From the file in this case it seems that Miss Tobiassen is now twenty years of age and is a native-born citizen of the United States, having been born in New York City in the year 1911. Her father, who was born in Norway, was naturalized as a citizen of the United States by the United States District Court for the Southern District of New York at New York City on February 20, 1912. In 1919 the parents of Miss Tobiassen returned with her to Norway, where they apparently have since resided. At that time, it will be noted, Miss Tobiassen was only eight years of age. She resided in Norway with her parents from 1919 until 1929, when she appears to have returned to the United States at the age of eighteen years, was admitted as an American citizen, and, so far as the record would indicate, has taken up her permanent residence in this country. Her proposed trip to Norway at this time is for the purpose of visiting

her parents merely. She is entitled to a return permit if she is an alien.

Bearing in mind that she was taken to Norway by her parents when a small child and has apparently returned to the United States and taken up her permanent residence herein, the question involved is whether this young woman lost her American citizenship through the action of her father in returning to Norway and taking up his permanent residence in that country. The decision of the chief of the Passport Division of the Department of State in deciding that this woman lost her American citizenship is based on Articles I and III of the Naturalization Treaty between the United States and Sweden and Norway which was concluded on May 26, 1869, consented to by the Senate on January 8, 1872, and proclaimed on January 12, 1872 (Malloy, Treaties, Conventions, &c., Vol. 2, page 1758). That convention was entered into between the President of the United States and the King of Sweden and Norway, and notwithstanding the fact that since the date of that convention Norway has separated from Sweden and has set up an independent Government of its own the Department of State regards this treaty as in force and effect between this country and Norway. Article I of this convention reads as follows:

> Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the Government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.
>
> Reciprocally, citizens of Sweden or Nor-

way who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the Government of Sweden and Norway to be American citizens, and shall be treated as such.

The declaration of an intention to become a citizen of one or the other country has not for either party the effect of citizenship legally acquired.

Article III of the convention provides:

If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country, and applies to be restored to his former citizenship, the Government of the last-named country is authorized to receive him again as a citizen on such conditions as the said Government may think proper.

In a protocol to this convention, signed on the same day, certain observations were made to more exactly define and explain the contents of the convention, and from this protocol, as well as from the articles of the convention itself, it appears that the convention was entered into for the purpose of providing for the reacquisition of nationality by return to the country of birth after naturalization in one of the other countries. In Article III of the protocol the third article of the convention is more exactly defined and explained as follows:

It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by

the Government of the United States to have renounced his American citizenship.

The intent not to return to America may be held to exist when a person so naturalized resides more than two years in Sweden or Norway.

There is nothing in the file at hand to indicate positively that the Government of Norway regards the father or Miss Tobiassen as a Norwegian subject under Articles I and III of the convention, although apparently he has taken up his permanent residence in Norway after having been naturalized in the United States in 1912. From Article III of the protocol there arises a presumption at least that the father has become a Norwegian subject in view of the fact that he has resided for more than two years in Norway and therefore the Government of the United States is entitled to hold that he has renounced his American citizenship under the convention. Apparently, however, a different situation exists in the case of Miss Tobiassen. Under the Fourteenth Amendment to the Constitution of the United States she became a citizen of the United States at the time of her birth in New York City in 1911. The mode of expatriation prescribed under the laws of the United States is found in Section 2 of the Act of March 2, 1907 (34 Stat. 1228; 8 U. S. C. 17), which declares that "any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken the oath of allegiance to any foreign state." It is said by John Bassett Moore in his Digest on International Law, compiled prior to the Expatriation Act of 1907, that the word "expatriation" has often

been used in the sense of forfeiture of the right to national protection instead of in the full sense of change of home and allegiance. Under Clause 4 of Section 8 of Article I of the Constitution it is provided that Congress shall have power to establish a uniform rule of naturalization. There is some question as to the extent of the power even of Congress to take away citizenship acquired by birth in the United States. In *United States* v. *Wong Kim Ark,* 169 U. S. 649, 703, the Supreme Court said, "The power of naturalization vested in Congress by the Constitution is a power to confer citizenship, not a power to take it away." The Congress of the United States, it is generally understood to mean and is defined in Section 1 of Article I of the Constitution, as consisting of a Senate and a House of Representatives. While Congress may have a right to declare what acts shall expatriate a citizen and forfeit right to protection abroad (*Ex parte Ng Fung Sing,* 6 Fed. (2) 670) under the provision giving Congress the right to pass a uniform rule of naturalization, there is some question whether the treaty-making power of the United States has a right to enter into any agreement with a foreign country which results in the expatriation of a native-born citizen of the United States without any positive act of expatriation by such citizen. Certainly, the mere remaining in a country for a temporary period by a native-born citizen of the United States should not be held to be an act of expatriation unless such conclusion is inescapable. (See *Leong Kwai Yin* v. *United States,* 31 Fed. (2) 738; and *Leon Wah Sut* v. *United States,* 31 Fed. (2) 740.) As prescribing a rule for the protection abroad of American citizens the conven-

tion is not open to question, but surely whatever presumption of expatriation may arise thereunder is overcome in at least the instant cases by reason of the return of Miss Tobiassen to this country and her taking up her permanent residence here. It is open to question that the Naturalization Convention is intended to apply to any except naturalized citizens who have returned to the country of birth.

It should be noted that when the father of Miss Tobiassen left the United States and took up his residence in Norway this country was still at war with Germany, and it is provided by Section 2 of the Expatriation Act of March 2, 1907, supra, "that no American citizen shall be allowed to expatriate himself while this country is at war." It is apparent from the facts in this case that Miss Tobiassen had no control over the matter of her removal in 1919 to Norway, nor her residence therein for a number of years thereafter, and it is significant that at the age of eighteen years she returned to this country and apparently has taken up her permanent residence here. In *United States ex rel. Baglivo* v. *Day,* 28 Fed. (2d) 44, it was held that a native-born citizen of this country who has not attained the age of twenty-one years can not renounce allegiance to the United States. The Baglivo decision was followed by Judge Goddard in the case of Carlos Pastizzo on August 15, 1929, unreported, and the same conclusion was reached on March 18, 1929, by Judge Massee of the United States District Court for Hawaii in the case of Shizeru Kumagi, unreported. It will be recalled that on July 28, 1915, the Attorney General held in the Berryman case that the wife of a citizen of the United States did not lose her American citizenship when her

husband expatriated himself by taking an oath of allegiance in Canada, the Attorney General declaring it to be a harsh doctrine to hold that a person who had in fact performed no act of her own volition should be placed in the position of having lost American citizenship (30 Att. Gen. 412).

Apparently, the persuading factor in the holding of the Passport Division of the State Department that Miss Tobiassen acquired Norwegian nationality and had lost her American citizenship is because of Section 6 of the Norwegian Nationality law of August 8, 1924, which is quoted in a letter of that Department to Miss Tobiassen as follows:

> When a person becomes a Norwegian subject in pursuance of Section 2 or of Section 4, his wife, and unmarried children under eighteen years of age, born in wedlock, shall also be deemed to be Norwegian subjects, provided they reside in Norway. If they do not reside there, and the wife subsequently, the marriage being in force, or the children, being unmarried and under eighteen years of age, take up his (their) residence in Norway, he (they) shall then be deemed to be Norwegian subjects provided the husband still is a Norwegian subject.

It appears to this office that it would be a strange situation if the law of a foreign country can be held to result in the expatriation of a native-born citizen of the United States. Obviously, all the Norwegian law does is to make the wife and the unmarried children of Mr. Tobiassen subjects of Norway, but there seems to be no sound reason why Miss Tobiassen can not be held to be an American citizen and yet a subject of Norway also, since it is well known that under the laws of the various governments of

the world persons have a double allegiance or dual citizenship. For example, a child born in this country of French, or English, or Italian parents, is a citizen of the United States by reason of birth in this country and may be a citizen or subject of the country to which the parents owe allegiance as well. Likewise, an Italian subject, for example, may become naturalized under our laws and have a child born in Italy, and such child may be a subject of Italy by reason of birth therein, but under Section 1993 of the Revised Statutes the child also is a citizen of the United States. There is nothing anomalous, therefore, in the fact that Miss Tobiassen may be a subject of Norway under Norwegian law and still be an American citizen by reason of birth in the United States and the fact that through no voluntary act of her own has she expatriated herself. It should be noted that Miss Tobiassen was a small child when taken by her parents to Norway, could, therefore, have formed no intent to abandon her residence in the United States, that she returned to this country as soon as she became self-supporting at the age of eighteen years, and, so far as her statements would indicate, regards the United States as her permanent residence to which she intends to return after her contemplated temporary visit to Norway. Accordingly, it is the opinion of this office that Miss Tobiassen never took up permanent residence in Norway and was not expatriated by reason of the return of her father to the country of his nativity. She is, therefore, a citizen of the United States and, apparently under Norwegian law, may be also a subject of Norway. In view of the fact that this decision is apparently in conflict with the decision of the Department of

State on the status of Miss Tobiassen, it is respectfully recommended that this question be put to the Attorney General for a final decision.

THEODORE G. RISLEY,
Solicitor.

BWB/gms

APPENDIX D

Address Reply to Commissioner of Immigration and Naturalization and Refer to File Number 23/22894.

U. S. DEPARTMENT OF LABOR,
IMMIGRATION AND NATURALIZATION SERVICE,
Washington, February 7, 1939.

Memorandum:

Prior to June 16, 1932, when the Attorney General rendered his opinion in the case of "Citizenship of Ingrid Therese Tobiassen" (36 Op. Atty. Gen. 535), it was the view of the then Bureau of Naturalization, and it so advised members of the public when such cases arose that retention of citizenship was a personal matter and expatriation could not be accomplished through the act of the father. This view was based upon a dictum contained in the opinion of the Supreme Court in *United States* v. *Wong Kim Ark* (169 U. S. 649, 704). The particular language involved is as follows:

> Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents or of any other country; for by our law, as solemnly declared by Congress "the right of expatriation is a natural and inherent right of all peo-

ple" * * * Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful.

Upon the rendition of the Attorney General's opinion in the *Tobiassen* case, the administrative view upon the subject was modified to conform to the Attorney General's opinion.

Careful effort has been made to locate and identify circular notifying the Field of change of practice with regard to the admissibility of children on birth certificates, but it appears that the copy of the Attorney General's opinion was sent without any accompanying comment.

With respect to the figures showing the number of cases, they are only an approximation, and it is not possible to even approximate the number who have been readmitted on passports or birth certificates.

Attached hereto are copies of letter of Aug. 11, 1931, from this Department to the Attorney General and Solicitor's memorandum of same date, re citizenship of Ingrid Therese Tobiassen.

(Sgd.) T. B. SHOEMAKER,
Deputy Commissioner.

Enclosures.

APPENDIX - E

Consular Statute Book of Sweden (1910), p. 3:

Law on the Acquisition and Loss of citizenship, dated the 1st of October, 1894.

Art. 8. Any one forfeiting his or her rights as a Swedish citizen in consequence of article 7, and not becoming a citizen of any other country regains those rights on again settling in Sweden, or if the King permits that the citizenship may be regained without so doing.

If the King has entered into a convention with a foreign Government that any person previously of Swedish nationali having acquired citizenship in that foreign country shall be considered as having renounced such right when he again takes up his domicile in this Country and after he has been living here for a certain time; if any person for such reason loses his foreign citizenship, he regains his Swedish citizenship at the same time.

If in accordance with the above stipulations of this article Swedish right of citizenship has been regained by the husband and father, such right also accrues to his wife and legitimate children under age, unless in the case mentioned in the second part they neither are domiciled in this Country when citizenship is regained by the husband and father, nor have lost their citizenship in the foreign country together with him. *Law of the 7th of May 1909.*

APPENDIX E

"Note" to Article 8 of the Swedish Law of October 1, 1894, contained in "Statute Book for Legations and Consulates" (1931)

NOTE.—This Article, as is clear from its wording, only bore application in the case of a person who had been a Swedish citizen, and hence not as regards the widow of a person who was formerly a Swedish citizen and, pursuant to Art. 7 of the Act, had already lost Swedish citizenship at the date of the marriage, nor as regards children who were born after the loss of Swedish citizenship, pursuant to this Article of the Act, by the father, or, in the case of children born out of wedlock, by the mother.

On the other hand, the enactment did bear application in the case of such persons as were excluded from the possibility of retaining Swedish citizenship by the handing in, pursuant to the last sentence of the first section of Art. 7, of a declaration such as is spoken of in the Article named. Thus, to descendants down to the third generation of a person who had emigrated from Sweden, the enactment secured a right to acquire Swedish citizenship.

Finally, it should be observed that the proviso of a person's "not having become a citizen of some other country" was not introduced with a view to exclude such persons as by virtue of birth have acquired citizenship both in Sweden and abroad. (Cf. the first section of Note to Art. 8 in the 1924 Act.)

The particular Agreements that the second sentence of the Article has in view are: firstly, the Convention signed with the United States of North America on 26 May 1869 respecting the nationality of persons who have emigrated, and the Protocol thereto of the same date, and secondly, the Supplemental Article to the Friendship, Trade and Navigation Treaty signed with the Argentine Republic on 17 July 1885. According to both those Agreements a previous Swedish citizen who has been admitted to the citizenship of the States above named, shall be deemed to have relinquished his new citizenship on his migration back to Sweden after he or she has resided in Sweden for the space of two years. The Agreements are only applicable in the cases of persons who have emigrated themselves, not consequently in those of their children who have been born in the country of migration.

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Petitioners,

vs.

MARIE ELIZABETH ELG.

No. 455.

OF

BRIEF FOR MARIE ELIZABETH ELG.

HENRY F. BUTLER,
Attorney for Marie Elizabeth Elg,
Investment Building,
Washington, D. C.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR MARIE ELIZABETH ELG.

OPINIONS BELOW.

The opinion of the District Court (R. 25-26)* has not been printed in the official reports; the opinion of the Court of Appeals (R. 31-39) is reported in 99 F. (2) 408.

*All references to the record are to the side folios (being the page numbers of the record submitted with the petitions for certiorari).

STATEMENT OF THE CASE.

Principal Questions.

The principal questions involved are (1) whether a natural born citizen of the United States can be deprived of her citizenship during her minority by the vicarious act of another and operation of foreign law; (2) whether a declaratory decree that she is a United States citizen will issue with respect to the Secretary of State.

History of Proceeding.

The above entitled causes are before this Court on writs of certiorari to the United States Court of Appeals for the District of Columbia.

The suits originated in the United States District Court for the District of Columbia in Equity proceeding No. 63408, filed January 14, 1937 as the complaint of Marie Elizabeth Elg, a natural born citizen of the United States, hereinafter referred to as the Plaintiff, against Frances Perkins, Secretary of Labor, Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization, and Cordell Hull, Secretary of State, hereinafter referred to as the Defendants, praying for (1) a declaratory judgment under the Federal Declaratory Judgments Act that she is a natural born citizen of the United States and entitled to all the rights and privileges of such a citizen; (2) a permanent injunction against the defendants Perkins and Shaughnessy enjoining them from instituting or continuing to prosecute proceedings for her deportation from the United States or in any way interfering with

her residence therein; (3) a permanent injunction against the defendant Hull enjoining him from making statements to the effect that she is not a citizen of the United States and from refusing to issue her a passport solely on the ground that she is not such a citizen; (4) a temporary injunction against the defendants Perkins and Shaughnessy enjoining them from taking further steps and proceedings to deport her pending final judgment in this action and (5) such further relief as may be proper and just (R. 6).

Upon statement in open court that the defendants Perkins and Shaughnessy would take no action to enforce the deportation of the plaintiff pending the final outcome of this case, a rule to show cause why a temporary injunction should not issue was discharged without prejudice to the rights of any of the parties on January 26, 1937 (R. 20-22).

The defendants on February 4, 1937 filed a motion to dismiss the bill of complaint on the ground that the plaintiff is not a citizen of the United States by virtue of the Laws of Sweden in conjunction with a protocol to a convention between the United States and Sweden and Norway and Section 2 of the Act of March 2, 1907 and for alleged defects in the pleadings, the form of the complaint and the jurisdiction of the Court (R. 23).

The parties stipulated that the Court may take judicial notice of the statutes of Norway and of Sweden, accepting as correct certain designated English translations but reserving the right in event of final hearing on evidence to produce expert witnesses to prove such foreign laws (R. 24, 25).

The cause was argued before the District Court and Judge Bailey rendered an opinion on November 1, 1937 that the motion to dismiss should be overruled as to the defendants Perkins and Shaughnessy, that the plaintiff is a natural born citizen of the United States and entitled to a declaratory decree to that effect, and that the complaint should be dismissed as to the defendant Hull "for the reason that the Court will not undertake by mandamus to compel the issuance of a passport, nor to control by means of a declaratory judgment the action of one whose function it is to consider and decide whether or not a passport should issue" (R. 25). Pursuant to the opinion final decree overruling the motion to dismiss as to defendants Perkins and Shaughnessy and declaring the plaintiff to be a natural born citizen of the United States and sustaining the motion to dismiss as to the defendant Hull and as to him dismissing the bill of complaint was entered November 18, 1937 (R. 26).

From the foregoing decree defendants Perkins and Shaughnessy and the plaintiff Elg appealed (R. 26).

The appeals were docketed as two separate causes in the United States Court of Appeals for the District of Columbia but consolidated for argument. On August 1, 1938 Chief Justice Groner delivered the opinion of the Court, affirming the decree of the District Court in all respects (R. 32-39) and on the same day order affirming the decree was entered (R. 39). Motion of plaintiff Elg, filed on October 15, 1938 for leave to file a motion to amend the decree was denied on October 19, 1938 (R. 41).

The mandate was stayed in the Court of Appeals; both the defendants Perkins and Shaughnessy and the plaintiff Elg filed petitions for writs of certiorari, which this Court granted.

Statement of Facts.

As these causes arise on the defendants' motion to dismiss the plaintiff's bill of complaint, the facts stated by the plaintiff in her pleadings must be taken as admitted or as though proven, to the same extent as though the causes had arisen on demurrer.

The plaintiff was a natural born citizen of the United States (R. 1; *Exhibit A*, R. 8; *Exhibit H-1*, R. 15). The defendants make no denial of this fact. She was born in Brooklyn, New York, October 2, 1907 (R. 1; *Exhibit A*, R. 8) of parents who had emigrated from Sweden and had become naturalized citizens of the United States prior to her birth, to wit, on September 24, 1906 (R. 2; *Exhibit A*, R. 8; *Exhibit C*, fol. R. 10; *Exhibit G*, fol. R. 14; *Exhibit H-1*, R. 15; *Exhibit H-3*, R. 19).

In or about 1911, when plaintiff was about four years of age, she was taken by her mother to Sweden, where she continued to live with her mother and later with both parents until she became twenty-one years of age, whereupon in 1929 she returned to the United States (R. 2; *Exhibit C*, fol. R. 10; *Exhibit G*, fol. R. 14; *Exhibit H-1*, R. 15).

On July 25, 1922 the plaintiff's father went to Sweden and has not since returned to the United States (R. 2, 4; *Exhibit H-1*, R. 15; *Exhibit H-3*, R. 19). However,

he retained his United States certificate of naturalization until at least November 13, 1934 when, defendants allege, he voluntarily surrendered it and executed a statement that he intended to remain in Sweden and did not desire to retain the status of American citizen (*Exhibit H-1*, R. 15; *Exhibit H-2*, R. 18; *Exhibit H-3*, R. 19). It does not appear of record that between 1906 when he became a naturalized citizen of the United States and November 13, 1934 when defendants allege he voluntarily surrendered United States citizenship, he took or subscribed to any oath of allegiance to any foreign country, or by voluntary or affirmative action on his part became naturalized in any foreign country, or committed any voluntary or affirmative act of expatriation from the United States or that any action was ever instituted to cancel his United States citizenship.

In 1928, before the plaintiff was twenty-one years of age, she inquired, through a friend, of the American Consul at Göteborg, Sweden about returning to the United States, and was informed that if she returned during her minority only an American birth certificate and identification papers would be necessary, but if she returned after attaining majority she should make application for and obtain an American passport (R. 2; *Exhibits B-1, B-2*, R. 9, 10). Accordingly, within eight months after attaining her majority, in 1929 the plaintiff applied at the American Consulate, Göteborg, for an American passport on the prescribed form of application, setting forth all of the pertinent foregoing facts then existent (R. 2; *Exhibit C*, fol. R. 10). This application was transmitted to the Secretary of State at Washington, D. C. and after its due considera-

tion, upon his express written instructions in conformity with the law as it was then interpreted and administered, the American Consul at Göteborg issued to the plaintiff, as a United States citizen, American Passport No. 91 (R. 2, 3; *Exhibits B-3, B-4,* R. 10, 11; *Exhibit D,* R. 11, 12). On September 17, 1929, within one year after attaining her majority, the plaintiff returned to the United States, was admitted at the Port of New York as a natural born United States citizen and has resided in this country ever since. The passport issued to the plaintiff in 1929 has never been recalled or cancelled (R. 3; *Exhibit E,* R. 12).

The plaintiff by her own voluntary or affirmative act has never committed any act of expatriation, nor become naturalized in any foreign country, nor taken or subscribed to any oath of allegiance to any foreign country, but on the contrary has at all times borne true faith and allegiance to the United States and has on several occasions taken and subscribed to the oath of allegiance to the United States (R. 1, 2; *Exhibits C and G,* fol. R. 10 and 14).

On this state of facts, in April, 1934, the plaintiff was subjected to proceedings instituted by the Immigration Service in New York City, was informed she was an alien, induced to execute a sworn affidavit substantially stating the foregoing facts which were made the basis of *ex parte* departmental inquiry and review at home and abroad. In April, 1935, she was formally notified that she was an alien illegally in the United States, that she could not remain in the United States, and she was ordered to depart from this country and threatened with deportation if she did not depart forthwith (R. 3; *Exhibit F-1,* R. 13; *Exhibits H-1, H-2,*

H-3, R. 15, 18, 19). The defendants Perkins and Shaughnessy from time to time postponed taking further steps toward her deportation, but have not countermanded their order and threats which have only been stayed pending final determination of this cause (R. 4; *Exhibits F-2, F-3*, R. 14; R. 21, 22).

In July, 1936, the plaintiff applied for an American passport upon an application in substance identical with her application of 1929 on which a passport had been issued to her, but the defendant Hull refused to issue a passport to her solely on the jurisdictional ground that he had not authority so to do because he had administratively determined she was not a United States citizen (R. 4, 5; *Exhibit G*, fol. R. 14; *Exhibit H-1*, R. 15).

Although the defendant Hull in the motion to dismiss contends that the bill should not lie against him because it involves the exercise of judgment and discretion in matters committed to his care as Secretary of State, from the Record it does not appear denial of a passport rested in any degree upon the exercise of his discretionary powers over the issuance of passports to United States citizens, but on the alleged ground that because she was not a United States citizen he lacked any jurisdiction to issue a passport to her (R. 4, 5, *Exhibit H-1*, R. 15; R. 23).

The defendants' conclusion that the plaintiff is not a United States citizen rests on the stated grounds that although she was a natural born United States citizen, nevertheless *during her minority* when about seventeen years of age, to wit, on July 25, 1924, *she expatriated herself* under the first paragraph of Section 2 of the Act of March 2, 1907, by virtue of the operation of

Swedish law. (R. 4, 24; *Exs. F-1, H-1, H-2, H-3, H-4,* R. 13, 15-20).

Further efforts before both the Departments of Labor and of State to establish the fact that the plaintiff was a United States citizen and therefore that the Secretary of Labor had no jurisdiction over her continued stay in the United States and that the Secretary of State did have jurisdiction to consider her application and authority in his discretion to issue an American passport to her, were of no avail. (*Exhibits F-2, F-3,* R. 14; *Exhibits H-2, H-4,* R. 18, 20).

There is no indication in the record that the plaintiff is in any way undesirable; on the contrary (although it does not appear in the printed record) the defendants have stated in open court in the course of arguments that the plaintiff is an entirely desirable person and that the only reason for the threatened deportation is their contention that she is an alien illegally in the United States.

Errors To Be Urged.

The Court of Appeals erred insofar as it affirmed that part of the decree of the District Court sustaining the motion to dismiss the bill of complaint as to the defendant Hull, and as to him dismissing the bill of complaint; and in failing to that extent to reverse the decree of the District Court and order the motion to dismiss to be overruled as to all defendants.

The plaintiff's complaint also contained prayers for permanent injunctions against the defendants which she will not press if the decree declaring her to be a natural born United States citizen is affirmed, but which she would press if this Court should deny her such declaratory decree.

Summary of Argument.

The plaintiff, a natural born citizen of the United States, cannot be divested of her birth citizenship during her minority. Particularly, she cannot be divested of her birth citizenship by the act of another or by operation of foreign law.

The Act of March 2, 1907, declaring that if a citizen commits certain acts he "shall be deemed to have expatriated himself" does not purport to apply, and does not apply, to native born minor children. For many years it has been construed not to apply to minors and it would be rendered unconstitutional by the construction for which the defendants contend.

The Treaty between the United States and Sweden and Norway is not self-executory, does not apply to minors, does not purport to divest any persons of citizenship, and would violate the Constitution if given the construction for which the defendants contend. Without discussing whether a treaty may in any circumstances transcend the Constitution, clearly it cannot do so to divest the native born of their birth citizenship against their will, with no showing of necessity or emergency for the general welfare, and as a mere matter of administrative convenience.

The plaintiff never acquired Swedish citizenship under the laws of Sweden, and therefore could not have been expatriated from the United States even upon the defendants' theories and contentions.

The plaintiff's bill for a declaratory decree lies against the Secretary of State as the controversy pertains to his *jurisdiction* of the matter, and not to his *exercise of discretion* after he has assumed jurisdiction. The plaintiff's bill lies against the other defendants; all requirements for proceeding under the Federal Declaratory Judgments Act have been satisfied. The declaratory decree should issue against all defendants.

ARGUMENT.

I.

Plaintiff is a natural born citizen of the United States by virtue of the Constitution of the United States.

1. Birth Citizenship.

The strongest argument that can be made in this case is the foregoing recitation of the undisputed facts which clearly show that the plaintiff was by birth a natural born citizen of the United States and that she has committed no act to divest herself of her birth citizenship.

Born in Brooklyn, New York, the plaintiff was a natural born United States citizen by virtue of Section 1 of the XIV Amendment to the Constitution, adopted in 1868, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

This Amendment was preceded by the passage in 1866 of the Civil Rights Act, which in part provided:

> "All persons born in the United States and not subject to any foreign power are declared to be citizens of the United States." (R. S., 1992; 8 U. S. C. 1.)

These provisions created no new law. They were in entire accord with the common or public law concept of citizenship and allegiance to the sovereign arising from the place of birth as it had consistently been construed

by our courts from earliest times with respect to all persons born in the United States and within its jurisdiction, except those of African descent whose ancestors had been held in bondage. They merely restated the existing law and extended it to embrace *all* persons born in this country and within its jurisdiction, including that class whom this Court in the Dred Scott Case *(Scott v. Sandford,* 19 Howard 393) had held were an exception to the general common law rule, and forever established the fact of citizenship by birth as the constitutional right of the native born American.

Nor was the concept of citizenship by birth new to the Constitution with the adoption of the XIV Amendment. The first section of the second article of the Constitution in part provides:

> "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; * * *"

In the words of Mr. Justice Curtis,

> "It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth." (Dred Scott case, *supra,* p. 576.)

2. Incidents of Birth Citizenship.

United States birth citizenship connotes the highest status of membership in the group of people who comprise this nation. The terms "citizen" and "subject" are in some respects synonimous, but the former more properly applies to members of a self-governing

lation such as the United States, and the latter to those owing allegiance to a monarch or a superior body over which they exert little or no control. Thus all free persons born within the colonies of North America whilst subject to the Crown of Great Britain, were natural born British *subjects*, but following the separation of the colonies, those who adhered to the revolutionary cause became *citizens* of the United States. *(Inglis v. Sailors Snug Harbor*, 3 Peters 99, 120.) In the further words of Mr. Justice Curtis, "free persons born within either of the colonies were subjects of the King" prior to our independence, but after acquisition of sovereignty by the several States "all such persons ceased to be *subjects* and became *citizens*." (Dred Scott Case, p. 576.)

American tribal Indians, although born within territorial United States, were not United States citizens, were not entitled to a voice in our government, and were termed "Domestic Subjects", until very recently. (7 Op. Atty. Gnl. 746, *Relation of Indians to Citizenship.*) In the same category are citizens of the Philippine Islands, who are *subjects*, but not *citizens*, of the United States, over whom Congress has express control and jurisdiction although they have no representation therein.

This distinction is more fully exemplified by the difference between the American doctrine that although our citizens have an inherent right of voluntary expatriation, they cannot be involuntarily expatriated from the United States and the doctrine of monarchial countries that although their subjects have no inherent right of expatriation, they are subject to involuntary expatriation at the pleasure of the ruling power.

Birth citizenship differs from citizenship by naturalization in that the former is the status acquired by birth, guaranteed by the Constitution, over which the Congress has been given no control by any of the specifically delegated powers; whereas citizenship by naturalization is wholly by virtue of action of Congress to whom the Constitution by Art. 1, Section 8, Cl. 4 delegates the power

> "To establish a Uniform Rule of Naturalization . . ."
>
> "And this power granted to Congress to establish an uniform rule of *naturalization* is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign Government." (Chief Justice Taney, *Dred Scott Case, supra*, p. 417.)

"A naturalized citizen" said Chief Justice Marshall, "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." *(Osborne v. Bank,* 9 Wheaton 738, 827.)

This doctrine was reiterated by Mr. Justice Gray when he said "The power of naturalization, vested in Congress by the constitution, is a power to confer citizenship, not a power to take it away." *(U. S. v. Wong Kim Ark,* 169 U. S. 649, 703.)

Whereas it may be contended that under the delegated power Congress has the authority to prescribe

not only on what terms the foreign born may become naturalized citizens, but on what conditions, not inconsistent with the original terms, they may retain that citizenship; nowhere can be found any delegated power or authority in Congress to prescribe, designate or control the terms or conditions on which the native born may retain or shall lose birth citizenship. However, that such power does not exist even with respect to naturalized citizens is evidenced by the fact that Congress has never passed any act prescribing divestment of citizenship by operation of law. It has, and properly, prescribed what voluntary acts on the part of the citizen might be deemed to be acts of expatriation, but the citizen is accorded a right to be heard, to rebut any presumption of voluntary expatriation which may have arisen against him and, even when the acts all exist, to refute the conclusion of expatriation by establishing a contrary intent on his part.

II.

The plaintiff has not expatriated herself. During her minority she was legally incompetent by her own act or by the act of another in her behalf voluntarily to expatriate herself. There is no provision of law or treaty order which she could be involuntarily expatriated.

As the plaintiff was undeniably a natural born United States citizen at birth, in order to sustain the defendants' contention that today she is an alien it must appear that she had the legal capacity voluntarily to expatriate herself and that she did so, or that

under the laws of this country she was subject to involuntary expatriation and that the necessary elements to effect such involuntary expatriation existed.

The plaintiff contends that during her minority she was legally incompetent either by her own act or by the act of another voluntarily to expatriate herself and that there is no provision in the Constitution or laws of the United States or in the treaties with foreign powers by virtue of which during her minority or afterwards she could have been expatriated involuntarily. The record shows that the plaintiff has committed no act of voluntary expatriation either before or after she attained her majority. (*Bagliro v. Day*, 28 F. (2) 44; *Ex parte Chin King*, 35 Fed. 354; letter of Honorable Charles E. Hughes, Secretary of State to American Diplomatic and Consular Officers dated November 24, 1923, published in *Compilation of Certain Departmental Circulars Relating to Citizenship, Etc.*, State Department, 1925, p. 118.)

1. Right of Expatriation.

Under the common law of England as construed at the date of our independence, no subject possessed the power of throwing off his allegiance and expatriating himself without the sovereign's consent. However, the birth and growth of this nation was predicated on the inherent right of *voluntary* expatriation in all persons which was generally recognized from earliest times in our own Courts. (*Shanks v. Dupont*, 3 Peters 242; *Inglis v. Sailors Snug Harbor, Supra; Dred Scott Case, Supra.)*

During the middle of the last century persons emigrated from all nations to this country, settled here, foreswore allegiance to their native countries and be-

came naturalized United States citizens. Many foreign governments denied the right of their subjects voluntarily to expatriate themselves and prosecuted them for desertion from military service and on other charges when they visited or returned to their native lands as United States naturalized citizens. That there might be no misunderstanding concerning the attitude and position of the United States in this respect, Congress restated the doctrine of voluntary expatriation and the law thereon as consistently construed by our courts, by passage in 1868 of an Act which declared:

> "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." (Act July 27, 1868, c. 249, Sec. 1; R. S. Sec. 1999; 8 U. S. C. 15.)

It is a far cry from the bold declaration made by our legislature that we would defend our naturalized citizens in all parts of the world in their inherent right voluntarily to expatriate themselves from their native countries and become citizens of the United States, to the efforts here and now being made to expatriate and

deport from this, her native, country one of our own natural born citizens, who is in this country and who is not being claimed or sought by any foreign country, on the theory that by operation of a foreign law she was somehow divested of her United States citizenship.

It would seem to be a distorted point of view that would twist the doctrine of the right of voluntary expatriation into an instrument involuntarily to deprive our own natural born citizens of their birthright during their years of minority and legal incapacity by virtue of foreign laws.

2. *Acts of Expatriation must be voluntary and intentional.*

It is the well established doctrine that the expatriation of a United States citizen can arise only from the voluntary intentional act of, and within the control of, the person affected; and that mere residence in a foreign country does not affect expatriation. Chief Justice Marshall, in delivering the opinion in *Murray v. The Charming Betsy* expressed the rule that has ever since been followed when he said

> "The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of our government; * * * But his situation is completely changed when by his own act he has made himself the subject of a foreign power." (2 Cranch 64, 119; and see III Moore, International Law Digest 711 *et seq.*)

All legislation on the subject and the vast weight of legal opinion contemplate a voluntary intentional act on the part of the expatriate. The only act under which

the plaintiff possibly could be held to have expatriated herself is the first paragraph of Section 2 of the Act of March 2, 1907, which provides:

> "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state." (34 Stat. 1228; 8 U. S. C. 17.)

The second paragraph of that section applies only to naturalized citizens, merely raises a presumption predicated upon voluntary acts, and expressly provides the presumption shall be rebuttable.

The mere passive acquisition of a foreign citizenship by having it *conferred* upon one by operation of a foreign government has not been deemed an act of expatriation.

> "Joel Barlow felt himself at home in Paris. In 1788, at the age of 34 he had first come abroad, and during 17 exciting years had been rather French than American. In 1792 the National Convention conferred on him the privileges of French citizenship—an honor then shared only by Washington and Hamilton among Americans." (III Moore's International Law Digest 715; quoting from 6 Adams History of the United States 245.)

Expatriation as the result of naturalization in a foreign country is predicated upon the customary form of voluntary, intentional naturalization. Acquisition or imposition of a foreign citizenship by virtue of acts which although voluntary and intentional, ordinarily would not be deemed to be acts of naturalization, have been construed not to constitute such a *naturalization in a foreign country* as to expatriate a United States

citizen performing such acts. (See III Moore's International Law Digest, 302, *et seq.)*

3. The Act of March 2, 1907 does not apply to natural born citizens during their minority.

The legislative history of Sec. 2 of the Act of March 2, 1907 clearly indicates it was never intended to apply to minor natural born United States citizens. It is practically based on the Report of the Citizenship Board appointed by Secretary of State Root in 1906 at the request of the Committee on Foreign Affairs of the House of Representatives. The report was adopted by that committee when Mr. Perkins, as its chairman, reported H. R. 24122 which eventually was enacted by Congress as the Citizenship Act of March 2, 1907 (34 Stat. 1228).

The report of the Citizenship Board was printed as Document No. 326 of the 59th Congress, Second Session. It sets forth the state of the law at the time and refers to the naturalization treaties then in force. At no place does it state that those treaties in any way affect or relate to minor children.

On the other hand, it quotes on page 76 Judge Deady's decision, *Ex parte Chin King,* 35 Fed. 354, 1888: "a father cannot deprive his minor child of the status of American citizenship • • • This status, once acquired can only be lost or changed by the act of the party when arrived at majority."

The report made various recommendations, one of which was that native-born citizens living abroad

should periodically register with diplomatic or consular officers of the United States. **This recommendation was not adopted.** (See *Cong. Rec., 59th Cong., Second Session, pages 1464-5.*)

Section 2 of the bill as reported contained a provision for the Secretary of State issuing to those desiring them and conforming to regulations, certificates of American citizenship. That section was stricken out as a committee amendment and Sec. 3 of the bill became Sec. 2 of the Act. The record shows that the bill probably could not have been passed otherwise.

There was very little debate in the House—forty minutes in all was allowed. *Mr. Perkins,* Chairman of the Committee, was in charge for the bill. As soon as the bill came up, *Mr. Lacey* asked if it was intended to pass the bill without the then Sec. 2 which related to certificates of citizenship, to which *Mr. Perkins* answered, *"Yes." Mr. Lacey, "So that it does not affect American-born citizens in residence abroad." Mr. Perkins, "No, that was stricken out."* This colloquy was preceded by some discussion in regard to the then Sec. 3 of the bill (Now Sec. 2 of the Act) in which Mr. Perkins said that it was drawn at the request of the State Department to meet the serious evil of naturalized citizens going back to their original countries and making trouble there and demanding protection as American citizens.

To a suggestion in the course of the debate raised as to whether Congress could constitutionally denationalize a citizen by reason of length of residence abroad, *Mr. Perkins,* chairman of the committee in charge of

the bill said, *"That does not apply to a man born in this country."* The question was also raised as to whether, in case a naturalized citizen lost his United States citizenship, so that he could not inherit under the laws of some states, that would not result also in the loss of heirship of his American-born heirs, and *Mr. Mann* said, *"Not his American-born heirs. They have their own citizenship."*

The bill was passed as amended (that is with original Sec. 2 omitted and Sec. 3 becoming Sec. 2 of the Act). The same action was taken in the Senate, where there was no debate, but reference was made to the elimination of Sec. 2 in the House bill.

As the bill was passed under suspension of the rules, it probably could not have passed at all if Mr. Lacey's question had not been answered by Mr. Perkins to the effect that it did not apply to native-born citizens, that the provision relating to their obtaining certificates of citizenship had been stricken out, and that loss of naturalized citizenship by parents should not affect their American-born children.

Congress certainly would not have attempted to entirely alter the law as to an entire class of native-born citizens without being absolutely explicit in making and defining those changes and definitely stating that a father could denationalize a native-born American minor child.

That Statute for many years was interpreted as not applying to or affecting natural born American minor children and it cannot now be reconstructed by inter-

pretation by writing into the first clause words to the effect that expatriation can be vicariously exercised for a minor by its father as that is contrary to the words of Judge Deady cited in the Citizenship Board Report (p. 76) which was also the report of the committee that "a father cannot deprive his minor child of the status of American citizenship conferred upon it by the circumstances of its birth under the Constitution."

To so change the statute would violate those elementary rules of statutory construction with which this Court is too familiar to require citations to sustain them, the most pertinent of which, however, is that a statute that is plain and can be administered in a manner that is wholly constitutional will not be interpreted in a manner to render it of doubtful constitutionality. That would certainly be the case if Section 2 of the Act of March 2, 1907, were now to be construed in the manner contended for by the defendants. As to its being of doubtful constitutionality, see *United States v. Wong Kim Ark*, and *Osborn v. Bank, supra.*

4. Long Established Practice recognized no loss of birth citizenship during minority.

In 1929 passport No. 91 *(Exhibit D)* was issued to the petitioner upon her full disclosure of all pertinent facts now before the defendants. While issuance to her of a passport may not be conclusive evidence that she is an American citizen, it is *prima facie* evidence of that fact, and when issued to her in the manner in which this passport was issued raises an almost irrebuttable presumption that it was properly issued in accordance with the law as then construed.

Under Section 4078 Rev. Stat. the Secretary of State issues passports and under Sec. 4076 Rev. Stat. "no passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States."

As to passports being *prima facie* evidence as to having been correctly issued see III Moore International Law Digest, 871 and 884 and Borchard's Diplomatic Protection, Ed. 1922, pp. 515 and 517.

In respect to so important a document and the facts thereby evidenced, the defendants cannot be heard lightly to repudiate the conclusions of their predecessors and brush them aside with a more allegation that the passport was issued in error. The rule of *omnia acta praesumuntur recte sunt* applies.

That it was not in error, but in accordance with the law as then construed is further evidenced by the communication relative to returning to the United States issued in 1928 by the American Consul in Sweden, the official representative abroad of the defendant Hull's predecessor (*Exhibits B-1, B-2*), and is confirmed by communication in 1935, by that Consul's successor, the official representative abroad of the defendant Hull (*Exhibits B-3 and B-4;* and see generally *Compilation of Certain Departmental Circulars Relating to Citizenship, etc., State Department, 1925.)*

That such was the accepted construction of the law is almost conclusively evidenced by the fact that the Labor Department adhered thereto and refused to deviate therefrom after the State Department effected an administrative change in its construction thereof resulting in the interdepartmental dispute which led

to the ill considered Tobiassen opinion (which will be discussed in detail below, p. 42).

The defendants Perkins and Shaughnessy in effect admit this in the letter of the Solicitor of the Labor Department to the Attorney General, dated October 18, 1938, and appearing as appendix B to their petition for certiorari filed in this case.

Thus, in 1929, under the then firmly established construction of law that a natural born American child could not be divested of its American citizenship during its minority, the petitioner was recognized to be an American citizen and properly admitted to this country. This was in accordance with the unquestioned doctrine of *Osborn v. Bank, Supra,* and *U. S. v. Wong Kim Ark, Supra.*

In re Tobiassen, 36 Ops. A. G. 535 and *U. S. v. Reid,* 73 F. (2) 153, (certiorari denied under memorandum specifically stating denial was on grounds petition for certiorari had not been filed within the time prescribed 299 U. S. 544) on which the defendants rely are not in point and in their conclusions are wholly wrong and should be disregarded and overruled, as more fully dealt with below. (See *infra* pp. 42-45; also Editorial Comment by Borchard, 30 Am. Journal Int. Law, 694).

5. Changed Construction and Application of the Law.

As demonstrated above and evidenced by the facts in this case, the predecessors of the defendants adhered to the long established and unquestioned construction of the law that a minor child could not be deprived of

its American birth citizenship by the vicarious act of another.

Obviously this may result in a child acquiring dual nationality, but there are many other circumstances in which persons may be born with or may acquire dual nationality. Dual nationality may have disadvantages, but it is recognized as existing. Dual nationality may cause inconveniences to the Departments, but the remedy for this inconvenience surely is not to deprive our own citizens of their American birth citizenship.

In 1930 the Department of State sent representatives to the International Conference on Nationality and Citizenship. Much of the discussion at that conference pertained to possible methods of avoiding dual nationality. See minutes of Conference in official files of State Dept.; also *Status of Naturalized Citizens* by Mr. Flournoy before National Counsel on Naturalization and Citizenship, April 2, 1937).

Some foreign countries specifically provide by law that when their minor subjects acquire a foreign citizenship they thereupon lose their native citizenship. Other foreign countries give such minors a right of election upon attaining majority. Most others, like ourselves, do not sanction loss or modification of birth citizenship during minority for any reason.

Although no legislative change in our laws followed this conference, the defendants now contend that *because Swedish law* by specific provision operates to divest a minor Swedish child of its Swedish citizen-

ship when it acquires a foreign citizenship by virtue of its parents' naturalization abroad, *as a matter of comity* we should reciprocally hold that a native born American child loses its American citizenship when it has Swedish citizenship conferred upon it. As there is no such provision in our laws, they contend for a novel construction of the Act of March 2, 1907 whereby to hold that a minor child *must be deemed to have expatriated itself* when a foreign citizenship has been conferred upon it under a foreign law.

6. There is no Act of Congress providing for loss of American birth citizenship by a minor child.

It has been demonstrated above that the Act of March 2, 1907 was not intended to, does not, and constitutionally can not, apply to minors who are natural born American citizens.

The defendants do not allege any other act of Congress to divest such children of their birth citizenship, and none in fact exists.

The question of whether or not Congress can divest minor children of so-called "derivative" American citizenship which it has conferred upon them under its legislative power to regulate naturalization must not be confused with the question in this case of whether Congress has the power to tamper with *birth citizenship* established directly under the Constitution. Congress has not attempted to exceed its constitutional bounds, and no such unconstitutional construction as the defendants contend for should be given to its acts.

A native born American citizen who has not attained the age of 21 years cannot renounce allegiance to the United States by any voluntary action of his own, either alone or in conjunction with his father (III. Moore, 715; *Baglivo v. Day*, 28 F. (2) 44). If expatriation cannot be effected by, or on behalf of, a minor American citizen, surely it cannot be inflicted upon him against his will.

The recognition by Congress of the right of natural born American citizens who are *sui juris* to expatriate themselves, and legislative definition of what sort of voluntary affirmative action by the citizen shall be recognized as effecting such expatriation, cannot be construed to constitute a legislative divestment of citizenship from minors by operation of law. As already shown, it does not apply to minors.

7. Constitutionally Congress cannot divest citizens of American birth citizenship.

Congress has only such powers as are delegated to it under the Constitution. With respect to citizenship it has the power to make uniform rules of naturalization (Constitution, Art. 1, sec. 8) as already pointed out (*supra* p. 14). This does not include the power to divest natural born citizens of their constitutionally conferred citizenship. That can be done only by their own affirmative act when *sui juris*. *(Osborn v. Bank, supra; United States v. Wong Kim Ark., supra; Ex parte Chin King, supra; Baglivo v. Day, supra).*

To give the Act of March 2, 1907 the construction contended for by the defendants would render it unconstitutional.

8. *Treaty with Sweden and Norway does not affect plaintiff's American citizenship.*

That the treaty between the United States and Norway and Sweden does not affect natural born citizens of the United States during their minority wherever they may be resident, is best evidenced by setting forth the treaty and the protocol thereto, which are as follows:

BIPARTITE TREATY BETWEEN UNITED STATES OF AMERICA AND SWEDEN AND NORWAY.

Convention signed May 26, 1869; Exchanged June 14, 1871; Proclaimed in United States January 12, 1872.

Article I. Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens and shall be treated as such.

Reciprocally, citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the government of Sweden and Norway to be American citizens, and shall be treated as such.

The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of citizenship legally acquired.

Article II. A recognized citizen of the one party, on returning to the territory of the other, remains liable to trial and punishment for an action punishable by the laws of his original country and committed before his emigration, but not for the emigration itself, saving always the limitation established by the laws of his original country and any other remission of liability to punishment.

Article III. If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored to his former citizenship, the government of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper.

Article IV. The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part, and Sweden and Norway on the other part, the 21st March, 1860, remains in force without change.

PROTOCOL.

The undersigned met today to sign the convention agreed upon in conformity with their respective full powers, relating to the citizenship of those persons who emigrate from the United States of America to Sweden and Norway, and from Sweden and Norway to the United States of America; on which occasion the following observations, more exactly defining and explaining the contents of this convention were entered in the following protocol:

I. Relating to the first article of the convention.

It is understood that if a citizen of the United States of America has been discharged from his American citizenship, or, on the other side, if a Swede or a Norwegian has been discharged from his Swedish or Norwegian citizenship, in the manner legally prescribed by the government of his original country, and then in the other country in a rightful and perfectly valid manner acquires citizenship, then an additional five years' residence

shall no longer be required; but a person who has in that manner been recognized as a citizen of the other country, shall, from the moment thereof, be held and treated as a Swedish or Norwegian citizen, and, reciprocally, as a citizen of the United States.

II. Relating to the second article of the convention.

If a former Swede or Norwegian who under the first article is to be held as an adopted citizen of the United States of America, has emigrated after he has attained the age when he becomes liable to military service, and returns again to his original country, it is agreed that he remains liable to trial and punishment for an action punishable by the laws of his original country and committed before his emigration, but not for the act of emigration itself, unless thereby have been committed any punishable action against Sweden or Norway, or against a Swedish or Norwegian citizen, such as non-fulfilment of military service, or desertion from the military force or from a ship, saving always the limitation established by the laws of the original country, and any other remission of liability to punishment; and that he can be held to fulfill, according to the laws, his military service, or the remaining part thereof.

III. Relating to the third article of the convention.

It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the government of the United States to have renounced his American citizenship.

The intent not to return to America may be held to exist when the person so naturalized resides more than two years in Sweden or Norway.

9. *Treaty is not self-executory.*

A mere reading of the treaty demonstrates that it is not self-executory. It does not purport to affect the

citizenship status of anyone but merely prescribes the extent to which, and the circumstances in which, each contracting country will recognize citizenship by naturalization acquired in the other country by citizens of the other.

The treaty does not purport to, and does not divest any individual of citizenship in any circumstances; indeed the *treaty* does not even mention renunciation or loss of citizenship.

The protocol, which is not a part of the treaty, expresses circumstances in which a naturalized United States citizen may be held by the United States to have renounced his American citizenship and prescribes that residence in Sweden or Norway for a period of more than two years may raise a *presumption* of such facts.

Such presumption is rebuttable, and has been so held in the only case dealing with the treaty. (*Anderson v. Howe*, 231 Fed. 546 and comments thereon by Mr. Flournoy, 31 Yale L. R. 861; III Moore, 754.) It is evidential only and, until the intent not to return has been properly established *as a fact* either by voluntary statement of the party or by judicial determination, the naturalized citizen cannot be held to have renounced his American citizenship.

Unless United States naturalized citizenship is voluntarily renounced, it continues until the certificate of naturalization *has been cancelled by valid proceedings in Court.* Such judicial cancellation (where no fraud is involved) is effective from the date of the Court's de-

cree, and is not retroactive, and whatever effect it may have on those having so-called "derivative" citizenship, it cannot effect them retroactively as of any date prior to the decree. Even less can it affect a natural born citizen retroactively. (See address of Henry B. Hazard, Esq. (U. S. Dept. Labor) Dec. 29, 1936 before National Council on Naturalization and Citizenship.)

Inasmuch as subsequent legislation supersedes a treaty, however conclusive the two year residence clause might have been when the treaty was ratified, it has been legislatively established as a mere rebuttable presumption by the second paragraph of Section 2 of the Act of March 2, 1907.

The defendants cannot be heard to contend that such a presumption was rebuttable as to the father but not in respect to his minor child; that subsequent to July 25, 1924 the petitioner's father could have rebutted the presumption and retained his naturalized American citizenship, although remaining abroad, but that the plaintiff was precluded by the presumption and must be held to have lost forever her American birth citizenship, although residing in this country. The best way to rebut the presumption of not intending to return is by returning, and the plaintiff stands here before this Court as evidence of her intent to be here.

The defendants err in contending (a) that the citizenship of either the plaintiff or her father was affected directly by the treaty (b) that, even if the treaty could directly affect citizenship, it could or did divest the plaintiff or her father of birth or naturalized

citizenship respectively (c) that residence in Sweden of the plaintiff's father did more than raise a mere rebuttable presumption (d) that such presumption could be availed of to affect citizenship otherwise than in valid Court proceedings (e) that such presumption was not rebuttable as to the plaintiff and that she has not rebutted it (f) that loss of citizenship by plaintiff's father occurred at any time prior to his voluntary renunciation thereof in 1934, or could be made retroactive in any circumstances (no fraud being shown).

10. Treaty does not apply to minor children.

This is one of the so-called "Bancroft Treaties". As in the case of the other "Bancroft Treaties" the principal purpose of this convention was to relieve immigrants from Sweden and Norway who had become naturalized citizens of the United States from liability to military service or punishment for evasion thereof, if they subsequently returned to their native lands as naturalized United States citizens.

It does not purport to apply to minors; it is not self-executory; and whatever its effect, it cannot constitutionally apply to natural born American citizens so as to expatriate them during their minority, for the same reasons as set forth under sub items 6 and 7 above, to which reference is made.

The clause in the protocol that intent not to return to the United States might be deemed renunciation of United States citizenship by naturalization merely expressed the law as construed and the two year clause

merely specified the period which might raise a presumption of such intent on the part of naturalized adults and obviously is not applicable to natural born American minors. It did not alter the necessary legal procedure in any respect.

To hold that a natural born American citizen can be deprived of his American citizenship as contended by the defendants would be unconstitutional under the Due Process Clause of the V Amendment which in that respect provides:

> "No person shall be * * * deprived of life, liberty, or property without due process of law"

as well as under Section 1 of the XIV Amendment (*supra*, p. 11).

Similar provisions in other "Bancroft Treaties" were construed very soon after their ratification as not in any way affecting the natural born citizenship of children whose parents were affected thereby. See numerous cases of that effect in III Moore's International Law Digest, 749 *et seq*, and especially at p 754; and *Steinkauler's Case*, 15 Ops. A. G. 15.

11. Treaty cannot transcend the constitution.

American citizens cannot by treaty with a foreign power be divested of constitutional rights which Congress has not the power to alter by legislation; nor can Congress legislate to that effect under treaty provisions.

The plaintiff refrains from going into this question in detail in this Brief, but will enlarge hereon if the Court desires or if the defendants contest this premise.

12. Plaintiff never became naturalized in any foreign country.

Even if the defendants be correct in their contention that under the Act of March 2, 1907, a *minor child* could be "deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws" the plaintiff submits she has never been so naturalized in any foreign country.

Specifically the plaintiff denies that she ever became a naturalized Swedish citizen, or in any way acquired Swedish citizenship.

Furthermore, "naturalization" as used in the Act of March 2, 1907 connotes acquisition of citizenship by voluntary affirmative action by the person naturalized and not merely by operation of law upon that person. This distinction is evidenced by the fact that in section 5, as amended, of that Act "naturalization" and "resumption of citizenship" are used in contradistinction to each other to designate *different* methods of acquiring citizenship. Similar distinctions appear elsewhere in that and other acts.

The legislative history of the act (see *supra*, p. 20) also bears evidence to the fact that in "naturalization" Congress was contemplating acquisition of citizenship by the well recognized voluntary procedures provided by the laws of this and most foreign countries, and not by operation of law as a result of circumstances beyond the control of the person affected.

Swedish law makes the same distinction. The Swedish Citizenship Act of 1894 provides for the *acquisi-*

tion or resumption of Swedish citizenship in certain circumstances by operation of law. *"Naturalization"* is something else, as Article 4 of that Act clearly demonstrates in providing:

> "Swedish citizenship *shall also be acquirable by naturalization in the manner and under the conditions that have been prescribed in a Special Law.* Naturalization of an alien man shall carry with it Swedish citizenship for his wife and for his children if legitimate and under age, unless a decision to the contrary is made at the time." (Italics ours.)

The special law here referred to, Royal Ordinance of February 27, 1858, under Article 2 provides a naturalization procedure quite similar to that of the United States, predicated upon an application duly filed (Article 1) showing that the applicant is twenty-one years of age, of good moral character, has been domiciled in Sweden for three years and has the means of supporting himself. Article 4 requires due proof of expatriation from the applicant's country of origin and the taking of the oath of allegiance to Sweden.

Thus it is clear that even if the plaintiff had Swedish citizenship conferred upon her as alleged by the defendants (which she denies) she did not thereby become *naturalized* in the sense that phrase is used in the Act of March 2, 1907.

13. Plaintiff's father did not acquire Swedish nationality under Swedish laws on July 25, 1924.

Assuming that the plaintiff's father (and mother) lost his (and her) Swedish citizenship under Article 5

of the Swedish Citizenship Act of 1894, upon becoming naturalized in the United States, it is clear that he did not regain his Swedish citizenship during plaintiff's minority under Article 8 (or any other article) of that Act.

The treaty with Norway and Sweden is not self-executory, and acquisition and loss of citizenship in the several countries must depend upon the domestic laws of those countries. At most, the treaty raises a mere rebuttable presumption of intent which may be pleaded as evidence in a legal action, but must be established as a fact to affect the citizenship status of the person involved.

From the record it appears that no legal proceedings were ever instituted to cancel or rescind the United States naturalized citizenship of the plaintiff's father; nor were legal or official proceedings taken in Sweden to reëstablish his Swedish citizenship at any time during plaintiff's minority nor prior to November 13, 1934. Therefore he in fact retained his American citizenship at least until he voluntarily surrendered his certificate of naturalization and renounced allegiance to this country on November 13, 1934.

Under Article 8 of the Swedish law prior loss of the adopted citizenship is a *condition precedent* to regaining Swedish citizenship. The plaintiff's father had not lost his United States citizenship on July 25, 1924 as the defendants contend, therefore he could not have reacquired Swedish citizenship on that date under Swedish law.

The defendants expressly disclaim that the second paragraph of Section 2 of the Act of March 2, 1907, has any bearing on the citizenship status either of the plaintiff or of her father *(Exhibit H-4)*, and as the treaty is not self-executory, there seems to be no basis for holding that the plaintiff's father lost his Naturalized American Citizenship except by voluntary renunciation in 1934. Consequently he could not have acquired Swedish Citizenship prior to 1934 and the plaintiff could not thereby have acquired Swedish citizenship during her minority.

14. The plaintiff did not acquire Swedish citizenship under Article 8 of the Swedish Citizenship Act of 1894 as contended by the defendants, nor indeed under any other article or any other act.

If it should be held however that plaintiff's father did acquire Swedish citizenship during her minority, to wit, on July 25, 1924, as alleged by the defendants, nevertheless the plaintiff did not acquire Swedish citizenship as she fell within one of the specifically excepted classes.

Article 8 of the Citizenship Act provides that:

> "If Swedish citizenship is recovered by a husband * * * Swedish citizenship shall also accrue to his * * * children who are under age, *unless* * * * they are not resident in Sweden at the time when the husband and father recovers Swedish citizenship *or have not lost along with him citizenship in the foreign country.*" (Italics ours.)

The two exceptions preventing the acquisition of Swedish citizenship by minor children are in the alter-

native. In the instant case, while the plaintiff may have been resident in Sweden on July 25, 1924, she did not lose her American citizenship "along with" her father, or at any other time, and therefore she could not have acquired Swedish Citizenship under Article 8.

The defendants cannot be heard to contend that the plaintiff lost her American citizenship *because* she acquired Swedish citizenship, as she could not have acquired Swedish citizenship unless she had first or simultaneously lost American citizenship.

It is submitted that the loss of American birth citizenship should not depend upon a departmental interpretation of a foreign law, especially where there has been no voluntary and affirmative act on the part of the American citizen to be so affected.

The plaintiff further submits that the legal residence of a child cannot be changed to the child's detriment during its minority and that as she was a legal resident of the United States, she was not, *in contemplation of law,* resident in Sweden at any time during her minority. Therefore she fell within both exceptions and could not have acquired Swedish citizenship.

15. Cases cited by defendants not in point.

The cases cited in the Courts below by the defendants except the Reid case had nothing whatsoever to do with loss of *American* citizenship. They merely hold that under our law when an alien becomes naturalized in the United States our law naturalizes along with him his minor children residing with him. Our

law does not purport to divest the minor children so naturalized of their alien birth citizenship, nor even make the conferring of American citizenship contingent upon their loss of their alien citizenship. As far as our law is concerned they may all have dual citizenship thereafter.

Where, however, the law of the child's country of origin provides that when its subjects, being minors, acquire citizenship of another country by virtue of their parents' naturalization there, they shall forfeit their citizenship of origin (as for example Swedish Citizenship Act of 1894, Art. 5), then we can properly require that upon acquisition by children of such "derivative" United States citizenship the country of origin shall hold *under its own law* that they have lost their citizenship of origin. That merely constitutes due protection of our citizens abroad in full conformity with the foreign law of their country of origin.

This is as far as the cases go. United States law does not provide for loss of United States birth citizenship by minors upon having a foreign citizenship conferred upon them, and indeed the laws of many countries do not provide for such loss of citizenship of origin merely upon having another citizenship conferred upon the child. The defendants' argument for reciprocity in this respect is carrying the Golden Rule too far and is clearly contrary to our Constitutional and Statutory law, and in effect proposes that the retention of United States citizenship shall be contingent upon the laws of the country in which any citizen happens to be for the time being.

The Act of May 24, 1934 cited by the defendants below can have no possible bearing upon whether or not the plaintiff lost her American Citizenship ten years before its enactment. Besides the act deals with children born outside the United States of alien parents, and does not even purport to relate to native born citizens.

16. Analysis of Tobiassen Opinion, 36 Op. A. G. 535.

The plaintiff contends that the Opinion of the Attorney General in the Tobiassen case was erroneous for substantially the same reasons that she contends the defendants err in this case. But in addition to this, the opinion was predicated on an erroneous or incomplete statement and consideration of the facts.

Ingrid Tobiassen, as appears in the opinion, was born in the United States of Norwegian parents, and therefore acquired at birth both American citizenship under the XIV Amendment to the Constitution and Norwegian citizenship under Section 1 of the Norwegian State Citizenship law of April 21, 1888, as amended (See U. S. House Doc. Vol. 72, No. 326, 59th Congress, 2nd Session, 1907, p. 473).

The opinion, although stating the circumstances of her birth, completely ignores the important fact of her dual United States and Norwegian nationality, and that she never lost her Norwegian citizenship acquired at birth.

The opinion states that after her birth her father became a naturalized citizen of the United States and

thereupon lost his Norwegian citizenship under Norwegian law. (This is presumably correct, under Section 6 (a) of the Norwegian law.) However, Miss Tobiassen's dual nationality was in no way affected by her father's naturalization. She already had American birth citizenship, therefore she did not acquire "derivative" citizenship by virtue of her father's naturalization here; and as she did not thereby acquire any new citizenship, she did not lose Norwegian citizenship under Section 6 (a), or any other section, of the Norwegian law.

Norwegian law does not provide for loss of Norwegian citizenship by a minor child merely upon *loss* of Norwegian citizenship by its father, but *only* where the child *acquires* a foreign citizenship by virtue of its father acquiring such foreign citizenship (Section 6 of the Norwegian law).

Consequently when Miss Tobiassen during her minority was taken by her father to Norway, even assuming that he became repatriated as stated in the opinion (which is highly doubtful on the facts as stated) her dual nationality was in no way affected thereby. She already had Norwegian citizenship by birth, therefore she did not *acquire* Norwegian citizenship by virtue of his repatriation under Section 2(b), or any other section, of the Norwegian law and therefore as she did not thus become naturalized in a foreign country in conformity with its laws, she did not lose her American birth citizenship under Section 2 of the Act of March 2, 1907, even under the defendants' theory, which is predicated upon *acquisition* of a foreign citizenship. This most important fact the opinion completely ignores.

Miss Tobiassen, therefore, was properly admitted to the United States during her minority on her birth certificate and there was no basis whatsoever for contending otherwise even on the defendants' theory of vicarious expatriation during minority.

To support its contentions in the Tobiassen dispute, the State Department relied on an unauthenticated opinion of the Norwegian Foreign Office that Miss Tobiassen had acquired Norwegian citizenship by virtue of her father's reacquisition of Norwegian citizenship. The facts upon which that opinion was based do not appear, but there is no evidence that they were any more accurate than those on which the Attorney General's opinion was predicated.

Thus the Opinion of the Attorney General in the Tobiassen case is predicated upon the erroneous assumption that Miss Tobiassen did not have Norwegian citizenship when she was taken to Norway during her minority; that her father in fact reacquired Norwegian citizenship the *very day* he returned to Norway; that he thereby *eo instanta* renounced his American naturalized citizenship and expatriated himself (in spite of statutory prohibition of such expatriation while a state of war existed, as it did at that time); and that she *acquired* Norwegian citizenship by virtue of her father's repatriation, which obviously she did not.

Predicated entirely upon gross error and inaccuracy, the opinion cannot be anything but erroneous.

Even if the facts had been as assumed in the opinion, the conclusion is wholly wrong. Reference is made

to comments in the opinion of Judge Fee in the District Court in *Reid v. U. S.*, 6 Fed. Supp. 800.

The opinion is so patently erroneous from every angle that it cannot be said to stand for anything.

17. *Analysis of the Reid Case (Reid v. U. S.*, 6 Fed. Supp. 800; *U. S. v. Reid*, 73 Fed. (2) 153; *Reid v. U. S.*, 299 U. S. 544).

Following the opinion of the Attorney General, *In re Tobiassen*, 36 Ops. A. G. 535, and relying principally thereon, the Labor Department opposed the repatriation under the Cable Act of Mrs. Arla Marjorie Reid, contending that she had lost her American birth citizenship, not, as she alleged, by marriage to an alien prior to the Cable Act, but rather by virtue of her father's naturalization in Canada during her minority.

In the District Court Judge Fee scathingly criticized the Tobiassen opinion, upheld the applicant's contentions and declared her an American citizen (*re Reid*, 6 Fed. Supp. 800).

The government appealed. Mrs. Reid was not represented by counsel. In the Circuit Court of Appeals Government Counsel introduced as *new evidence* to prove what they contended was the long established construction of the law, unauthenticated quotations of portions of an unpublished, inter-departmental communication of October 7, 1931 from the State Department to the Attorney General relative to the Tobiassen controversy then pending. Such evidence was clearly inadmissible: it was gross and reversible er-

ror on the part of the Court to allow its admission. From its very nature it was not probative, but merely presented the arguments of the State Department in a highly controversial dispute then pending, concerning which the Labor Department (whose opinion carries as much weight as the State Department) took exactly the opposite view.

Yet, instead of protecting the rights of the respondent, Mrs. Reid, and excluding such improper evidence, the Court practically rested its opinion on the statements in that letter, quoting long portions to support its decision in which it reversed the District Court and sustained the new interpretation of the law. *U. S. v. Reid*, 73 Fed. (2) 153.

It is submitted that the statements in the letter of October 7, 1931, concerning the long established practice of the State Department are inaccurate, misleading and contrary to the facts as they have been shown to exist.

Mrs. Reid, unrepresented by counsel and without funds to carry on litigation, failed to petition the Supreme Court of the United States for certiorari within the time prescribed. However, in November, 1934, Mrs. Barney and Mrs. Carr petitioned for leave to appear *amici curiæ* and to file a motion for a rehearing and a brief. Their petition was held for over a year and on January 13, 1936, leave to file such a motion and brief was granted. The government filed a brief in opposition and five months later, on June 8, 1936, the motion for rehearing was denied on the merits. Within ninety days thereafter, in Septem-

ber, 1936, Mrs. Reid filed a petition for certiorari, contending that the motion for rehearing filed by Mrs. Barney and Mrs. Carr had extended the time within which the principal contestant could petition for certiorari. This Court, however, in a memorandum held the time for petition for certiorari had expired, and for that reason denied certiorari (*Reid v. U. S.*, 299 U. S. 544). Such denial of certiorari does not appear to constitute affirmance of the decision of the Circuit Court of Appeals.

18. Legislative intent is not to expatriate native-born citizens.

The general intent of Congress evidenced by the consistent trend of legislation to preserve birth citizenship except in cases where the citizen unequivocally casts it off and to facilitate repatriation of our native born citizens who for some reason other than voluntary and affirmative renunciation of allegiance to this country are deemed to have lost their United States citizenship, is contrary to the interpretation here sought by the defendants. Thus, in Section 3 of the Act of March 2, 1907, by which Congress provided "That any American woman who marries a foreigner shall take the nationality of her husband", it also provided for her repatriation either at home or abroad upon the termination of the marital status.

Although this Court held marriage to be a voluntary and intentional act which could constitute expatriation (*Mackenzie v. Hare*, 239 U. S. 299), Congress apparently concluded it was not a customary act of ex-

patriation, was contrary to the policy of this country and consequently in 1922 by the Cable Act it definitely repealed that provision and specifically declared that a woman citizen of the United States shall not cease to be such a citizen solely by reason of her marriage (unless she should marry an alien ineligible to citizenship) although during continuance of the marriage she should be subject to the same presumption of expatriation arising from residence abroad, as in respect to naturalized citizens; it also provided for the repatriation of women who had lost their citizenship by marriage under the prior Act (Act of September 22, 1922, 42 Stats. 1021-1022). In 1930 Congress amended the Cable Act by repealing the part of Section 3 providing for presumptive expatriation arising from residence abroad (Act of July 3, 1930, 46 Stats. 854). In 1931 Congress further amended this section by repealing the provision with reference to marriage to an alien ineligible to citizenship and modified the requirements for repatriation (Act of March 3, 1931, 46 Stats. 1511). Again in 1936 Congress amended the Cable Act further to facilitate repatriation of native born women who had lost or were believed to have lost their citizenship by marriage prior to 1922. (June 25, 1936, 49 Stats. 1917.)

In legal contemplation married women and children have been deemed to be under certain disabilities in consequence of which they have been an especial charge of the courts and the legislature. It is difficult to believe that Congress could have been so solicitous for the reacquisition and retention of United States citizenship by women who voluntarily marry foreigners and live abroad and yet so willing to expatriate and debar from this country native born children who, legally incapable

of performing a voluntary act of expatriation, have been taken abroad by their parents, but now seek to live here as citizens.

Congress also made provision for speedy repatriation of former American citizens who served in the Allied armed forces during the World War and who had been required to take an oath of allegiance to such foreign government, whereby, under the Act of March 2, 1907, they would be deemed to have expatriated themselves from the United States. There are numerous instances where Congress has modified requirements so as to facilitate naturalization of foreign born aliens who fall into certain preferred classes.

The absence in the past of any such remedial legislation for the repatriation of native born citizens of the United States who during minority were expatriated, and the introduction in the present session of Congress and the session just concluded of several such remedial bills are further evidence that until the change in the administrative interpretation and application of the law following the unfortunate decisions in the *Reid* and *Tobiassen* cases (*supra*) it was not supposed by anyone that a natural born United States citizen could be expatriated during minority.

The defendants on page 13 of their petition for certiorari cite and quote the *private* act of June 25, 1938 for the benefit of Albin H. Youngquist (Private No. 751, 75th Cong., 3rd Ses., introduced as S. 3633) as an indication of legislative intent with reference to expatriation of minor children. As this is a private act, it is no indication of legislative intent with reference to public

acts. The legislative branch of the government cannot make judicial determinations, and the conclusions expressed in this act, as well as those expressed in the report of the Senate Committee which accompanied the bill (75th Cong., 3rd Ses., S. Rep. 1316 to accompany S. 3633) are obviously predicated on administrative interpretation as expressed in the letter of March 24, 1938 from James L. Houghteling, Commissioner of Immigration and Naturalization, to Honorable Richard J. Russell, Jr., Chairman of the Committee, which was incorporated in the report and is as follows:

IMMIGRATION AND NATURALIZATION SERVICE,
Washington, March 24, 1938.

Hon. RICHARD B. RUSSELL, JR.,
United States Senate, Washington, D. C.

MY DEAR SENATOR RUSSELL: This will acknowledge receipt of your letter of March 10, enclosing for comment and recommendation by this Service Senate bill No. 3635,* authorizing the naturalization of Albin H. Youngquist, and for other purposes.

The records of this Service show that Youngquist was born in the United States in Beadle County, S. Dak., on December 28, 1907, and last entered the United States from Canada at Portal, N. Dak., on January 8, 1931, at which time he was apparently admitted as a United States citizen.

Accompanied by his parents, Youngquist proceeded to Canada in 1908, and his father, who is a native of Sweden, became a naturalized citizen of Canada in 1912. The action of the father in becoming a citizen of Canada had the effect of investing the son with that citizenship, and Albin Youngquist therefore lost his United States citizenship under section 2 of the act of March 2, 1907. Consequently, when he last entered the United States in 1931, he had the status of an alien and

*This reference should be to Senate Bill No. 3633.

was therefore subject to the general requirements of the immigration law.

Youngquist attempted to return to Canada on October 13, 1932, and again on December 7, 1933, but was denied admission on both occasions by the Canadian authorities. He was made the subject of deportation proceedings in March 1937 and, although found to be deportable, the Department directed that he be granted permission to depart voluntarily to any country of his choice, with the further direction that he be granted a preexamination and furnished a letter to the Canadian authorities, guaranteeing his readmission to the United States in the event that after his arrival in Canada the American consul to whom he would make application for a visa should refuse such a document. His parents are residing in Rama, Saskatchewan, Canada.

So many cases similar to that of Mr. Youngquist have arisen that Senator Thomas, during the last session of Congress, introduced a bill (S. 1169) entitled "A bill to clarify the expatriation laws with regard to certain native-born citizens of the United States, and for other purposes," and no steps are being taken to enforce the departure of Mr. Youngquist or other aliens in a similar status pending action by Congress on the bill in question.

While we interpose no objection to favorable action on Senate bill 3633, we are of the opinion that, in view of the considerable number of similar cases now pending before this Service, it would be to the best interest of all concerned to give favorable consideration to Senate bill 1169, introduced by Senator Thomas at the last session of Congress, provided this bill is still on the calendar.

Please return the enclosed file when it is no longer needed by your committee.

Cordially yours,

JAMES L. HOUGHTELING,
Commissioner.

Although the Commissioner's conclusions may express the administrative point of view, if the plaintiff is correct in her contention that a native born citizen cannot be expatriated during minority under the Act of March 2, 1907, then the Commissioner's conclusions are clearly in error.

It should also be noted that under the law of Canada in effect when Youngquist was taken into Canada and when his father became naturalized, minor children were not fully naturalized with their parents but Canadian citizenship was conferred upon them *only while within Canada.* (Law of Canada, Chap. 77, Revised Statutes for 1906). It is apparent therefore (as was submitted to this Court in the petition for certiorari of Arla Marjorie Reid, October Term, 1936, No. 352) that such persons are not deemed citizens when outside of Canada. That this is the view taken by the Canadian officials is undeniably evidenced by statements in the Commissioner's letter that Youngquist was on two occasions and within a short time after his return to the United States denied admission to Canada; had he been a naturalized Canadian citizen, Canada could not have refused him admission. Surely Congress never intended that the acquisition of such a limited citizenship should effect the expatriation of a native born child.

Furthermore (as pointed out in the *Reid* petition) at the date of Youngquist's alleged naturalization, as well as at the date of Mrs. Reid's alleged naturalization, naturalized Canadians did not become British Subjects, but were *aliens* in Great Britain, and therefore could not be embraced in our treaty of 1870 with Great Brit-

ain (see *Ex parte Markwald* (1918), 1 K. B. 617, and *Markwald v. Attorney General* (1920) 1 Ch. 349).

It is also interesting to note the Commissioner's recommendation that favorable consideration be given to S. 1169 entitled *A bill to clarify the expatriation laws with regard to certain native born citizens of the United States, and for other purposes*, which provided that no native born citizen could be expatriated during minority, and his statement that pending action by Congress on that bill, neither Mr. Youngquist nor other aliens in a similar status were being deported.

The letter of the Solicitor of the Labor Department to the Attorney General set forth as Appendix B to the defendants' petition shows the number of such cases.

19. No limitation to defendants' doctrine.

If the defendants prevail in their contention there would appear to be no limitation to the extent to which native born American citizens might be arbitrarily expatriated by act of Congress or by treaty with a foreign power. If a minor child can be so expatriated as a result of the non-act of a parent (as in this case the record shows no voluntary act of expatriation on the part of the plaintiff's father) then there is nothing to prevent Congress from expatriating any American born citizen for any reason, however frivolous. American citizens have rights, and those rights can not be bartered away unnecessarily even by their Government. They are not subjects or slaves, but free citizens whose life, liberty and property, is guaranteed perpetually. In the Court of Appeals in the course of argument the defendants contended that as a result

of a parent's naturalization in a foreign country a minor child who had been born in, and was continuing to reside in the United States could be held to have been divested of its birthright of citizenship, and thereafter deported as an alien, although it had never been out of this country. This is the logical direction in which their doctrine carries them.

If the mere conferring of a foreign citizenship, in conformity with the laws of such foreign state and in accordance with the terms of a treaty lightly entered into, and under no compulsion, is to effect expatriation and/or deportation from the United States, regardless of the wishes of the individual, then any foreign government might by treaty and the enactment of laws conferring its citizenship upon any class of American citizens, within or without its territory and jurisdiction, effect the involuntary expatriation of such class, and when such persons are found in the United States our officials would be in duty bound to deport them and send them abroad possibly for military service, or to suffer a worse fate in a dictatorship or communistic state. This suggestion, although sounding fantastic, would not exceed the scope of the doctrine contended for by the defendants. In fact this Government could agree, in times of peace, by treaty to sell Alaska to Russia, and agree that all its inhabitants, regardless of their American birth, should become citizens of the U. S. S. R., thus exiling them from their native land forever.

But such arbitrary action is not within the power of Congress by legislation or by treaty. Even though there be no absolute constitutional prohibition against the involuntary expatriation of native born citizens it

appears to be a matter of public law in a Democracy, too obvious to necessitate express constitutional or legislative mention, that the persons comprising the component part of this nation—the citizens of the United States—cannot be cut out from that membership involuntarily, expatriated and deported against their wishes to a foreign country, when accused of no crimes against the nation or their fellow citizens, and in the absence of some compelling reason therefor. The Government cannot effectuate a treaty which is contrary to the spirit of the Constitution. (*Dred Scott Case, supra; Downes v. Bidwell*, 182 U. S. 244, 282, 283, 291, 298).

While conditions are conceivable under which a Treaty involuntarily expatriating a class or classes of native born citizens might be sustained as Constitutional, its language would have to be wholly unambiguous, and it would have to be shown conclusively in support of such a treaty that such action was required by some impelling cause such as the necessity of doing so to preserve the Independence and territorial integrity of the rest of the Nation. No reason whatsoever had been advanced in this case for depriving the plaintiff of her guaranteed birthright. Certainly there is no suggestion that the Nation or its best interests would be imperilled by permitting her and others similarly situated to retain their citizenship, and continue to live in the land of their birth. Such an arbitrary exercise of the treaty making power directly contrary to the spirit of the Constitution, and depriving citizens of every personal right is clearly unconstitutional.

III.

This Court has power to grant and should have granted the relief sought against defendant Hull; such relief does not involve the exercise of judgment and discretion by the defendant Hull.

Undoubtedly the issuance of a passport to an American citizen rests in the sound judgment and discretion of the Secretary of State, and the courts will not interfere by injunction to prevent, or mandamus to compel, such issuance. However, judgment and discretion of the Secretary of State are not involved in the case at bar, the issue is simply jurisdictional.

In the instant case the defendant Hull has determined the plaintiff is not an American citizen and therefore that he has no jurisdiction to issue a passport to her. (See letter from Chief of Passport Division to petitioner, dated July 29, 1936, concluding "in view of the foregoing, the Department *is obliged to say that, as you cannot be considered to be a national of the United States, a passport cannot be issued to you.*" (Italics ours.) *Ex. H-1, R. 15*).

The courts can and will entertain cases to determine whether an executive officer has jurisdiction of the matter in issue and by appropriate action will enjoin him from taking, or compel him to take, jurisdiction of the case, without, however, decreeing how he shall exercise his sound judgment and discretion or what action he shall take in the matter. If the plaintiff is an American citizen, then the defendant Hull errs in denying that he has jurisdiction to issue an Amer-

ican passport to her; although whether or not he will issue such passport may then rest in his sound judgment and discretion.

There is a long line of cases sustaining this proposition, commencing with *Decatur v. Paulding*, 14 Peters 497 (1840) and continuing to March 29, 1937, when in the *Virginian Ry. Co. v. System Federation*, 300 U. S. 515, Mr. Justice Stone said:

> "It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers, *United States ex rel. Greathouse v. Dern*, 289 U. S. 352, 359, to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority, although the court will not assume to control or guide the exercise of their authority. *Interstate Commerce Commission v. Humboldt S. S. Co.*, 224 U. S. 474; *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638; see *Work v. United States ex rel. Rives*, 267 U. S. 175, 184; *Wilbur v. United States, ex rel. Kadrie*, 281 U. S. 206, 218."

As above set forth, the issue in this case does not involve the exercise of sound judgment or discretion by the defendant Hull, but a question of jurisdiction which properly comes within the purview of this Court.

While the Secretary of State may be immune from judicial scrutiny respecting acts properly done by him in the exercise of his sound judgment and discretion, that does not constitute a general immunity with reference to acts which are illegal, arbitrary and beyond his power and authority or which are based, not on his sound judgment and discretion, but upon his erroneous conclusion of law.

There is no basis in the cases, the statutes or in the public interest for contending that a Declaratory Judgment should not issue respecting a controversy in which the Secretary of State is involved simply because he is a necessary party, particularly where the point in issue does not involve the exercise of his sound judgment and discretion. Indeed, a Declaratory Judgment is the very proceeding which should be employed in such matters as affording a means for correcting illegal, erroneous or arbitrary acts by the Secretary of State without interfering with the proper exercise of his sound judgment and discretion. (See *Federal Declaratory Judgments Act*, printed as Appendix A to this brief, *infra* p. 67).

The official pronouncement by the Secretary of State that the petitioner is not a United States citizen involves far more than the mere refusal to issue a passport; it illegally deprives her of all diplomatic protection at home and abroad to which a citizen of the United States is entitled as a matter of right and which does not rest in the judgment and discretion of any executive officer.

The Courts may very properly refrain from interfering by mandamus or by mandatory injunction with the issuance of passports to United States citizens by the Secretary of State, as that presumably involves the exercise of sound judgment and discretion reposed in him. However when the Secretary of State usurps the power of the Court and standing solely upon an administratively changed interpretation of the law (*Exhibits B-3* and *B-4* R. 10, 11) contrary to a long line of decided cases, purports to determine and hold that a natural born United States citizen has lost

her United States citizenship during her minority as a result of a foreign law and has thereby become an alien and coincident to such conclusion declines to issue a passport as being without his jurisdiction to do so (also necessarily depriving her of all diplomatic protection at home and abroad) it is high time the Court stepped in.

This is the very type of *case* intended to be benefited by the Federal Declaratory Judgments Act, and that is the very type of *remedy* appropriate to this sort of controversy.

A Declaratory Judgment adjudicating the fact that the petitioner is a citizen of the United States will not interfere with the exercise of judgment or discretion on the part of the defendant Hull, but will dispel his erroneous conclusion that he has no jurisdiction of the matter and will establish the petitioner's right to all the rights, privileges and protection of a United States citizen at home and abroad, which do not rest in the judgment and discretion of any executive officer.

In these days of advancement such a progressive remedy, free from coercion, should be welcomed and not be objected to by the executive branches of the Government.

IV.

An actual controversy within the meaning of the Federal Declaratory Judgments Act between the petitioner and the defendant Hull clearly exists in relation to the making of statements by said defendant impugning the petitioner's American citizenship.

A United States citizen has the right not to have his citizenship denied or impugned by a public servant.

Official and public utterances by an executive officer purporting to determine and state that such United States citizen has expatriated himself by operation of foreign and domestic law, necessarily resulting in depriving him of his rights and privileges as an American, causing him inestimable and irreparable damage, and subjecting him to threats of arrest and deportation, clearly constitute an actual controversy within the meaning of the Federal Declaratory Judgments Act. (*Aetna v. Haworth*, 300 U. S. 227; *Columbian Ins. v. Foulke*, 89 F. (2) 261).

The defendant Hull is the executive officer to whom other officers of both the Federal and State Governments look for information concerning nationality and citizenship status of persons.

Statements by the defendant Hull that the plaintiff is not a United States citizen have the weight of official utterances and constitute more than the mere expression of opinion. Such statements are intended by the defendant Hull to have, and do have, the weight and dignity of official decisions with other officers of the Government. In the case at bar, his expressed opinion and utterances constitute an invasion of the plaintiff's right, as an American citizen, not to have such damaging statements, unfounded in fact or in law, made and published about her by a public servant. They result in directly interfering with the plaintiff's rights, depriving her of the diplomatic protection at home and abroad to which, as an American citizen, she is entitled, and in setting in motion machinery which, unless checked, will result in further actual invasion and interference with her rights, her liberty and her personal freedom.

The controversy, therefore, between the plaintiff and the defendant Hull with respect to his refusal to issue her a passport involves a jurisdictional question, justiciable by the courts, which have not infrequently decided such issues, compelling an executive officer to assume jurisdiction of a matter, although leaving his decisions and acts to his sound judgment and discretion.

V.

An actual controversy exists between the petitioner and the defendants Perkins and Shaughnessy.

The decision of this Court in *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, in an opinion handed down by Mr. Chief Justice Hughes, reversed the decisions below and clearly establishes that on facts as shown in the case at bar an actual controversy exists between the plaintiff and the defendants Perkins and Shaughnessy and that the issue here involved is of the precise nature intended to be justiciable under the Federal Declaratory Judgments Law. (See Appendix *A infra*, p. 67).

The facts in the case at bar come squarely within the scope of the *Aetna* decision. In the *Aetna* case the defendant filed written claims against the plaintiff; in the instant case these defendants filed written notices on the plaintiff that they had determined she was an alien, that she was improperly in the United States and that it would be necessary for her to depart therefrom *(Exhibits F-1 and H-1, R.* 13, 15). In neither the *Aetna* case nor the case at bar have the defendants instituted actions wherein the plaintiffs could prove their non-liability, although in each case it was

within the power of the defendants to do so and the plaintiffs in both cases have been living under the continual threat of such suits. The case at bar involves an actual controversy fully as much as the *Aetna* case; the Court has construed "cases of actual controversy" broadly, holding they are not limited to traditional forms or traditional remedies. In the case at bar there is clearly an actual controversy between the plaintiff and the several defendants as to whether or not she is an American citizen.

This issue does not involve a mere difference of opinion, upon hypothetical facts, but a controversy threatening the liberty, rights and privileges of the plaintiff upon actual facts. As in the *Aetna* case, so here, the controversy involving the nationality of the plaintiff is justiciable and admits of special relief through a conclusive decree.

As expressed in the *Aetna* case the nature of this controversy and not the method of presenting it, is determinative of whether a suit for Declaratory Judgment will lie.

The plaintiff's alleged right to be immune from the threats, interferences and claims of the defendants is a "right" within the meaning of the Declaratory Judgments Act. (*Columbian Insurance Co. v. Foulke*, 89 F. (2) 261, C. C. A., 8th Circuit).

Thus, in the case at bar, it is clear that a controversy exists concerning the plaintiff's American citizenship. It is not necessary that she wait until the defendants cause her to be arrested preparatory to attempting to deport her or until she has been charged with a pur-

ported breach of the peace for committing some act prohibited to aliens, though lawful to United States citizens, before her nationality can be determined and she can be judicially apprised of her legal rights.

The cases cited by the defendants have either been reversed by the Supreme Court of the United States or are not in point and are not controlling of the present situation. Reference is made to the analysis of those cases and remarks concerning and distinguishing them by the Chief Justice in his opinion in the *Aetna* case.

VI.

Statutory and substantive law authorize granting of Declaratory Judgment in this case; the case has been properly brought; the District Court has jurisdiction of the case and of the parties.

That the District Court has jurisdiction of this suit seems hardly to require argument. That Court has jurisdiction over the several defendants; it is the proper Court in which to commence an action against them and they have appeared; it has jurisdiction of citizenship and nationality matters such as constitute the sole issue here involved, and it has power to grant the relief prayed for; no other Court has prior jurisdiction; all elements essential to jurisdiction exist and no element which would deprive the Court of jurisdiction exists. This is an appropriate case for relief by way of a Declaratory Judgment, *Aetna v. Haworth*, 300 U. S. 227; *Columbian Ins. Co. v. Foulke*, 89 F. (2) 261.

There is no plain, adequate and complete remedy at law and even if there were, that fact would not deprive

the plaintiff of her right to a declaratory judgment. There is no proceeding at law by which the plaintiff can obtain an adjudication that she is a United States citizen and can be relieved from the invasion and denial of her rights and privileges by these defendants, and from the harassments to which they are continuously subjecting her.

Habeas corpus proceedings are not available to the plaintiff at this time. In order to make them available she, herself, would have to request that an order of deportation and a warrant for arrest be issued against her (thus greatly prejudicing her own case) and would then have to submit to arrest and go through the process of being confined while bail bond was being obtained and thus bring up the case in a most unsatisfactory manner.

In any event, *habeas corpus* is not an adequate remedy at law where no order of arrest has been issued because it is not existent at the time and no remedy is adequate within the meaning of statutory and substantive law to defeat equitable jurisdiction unless the plaintiff can step immediately out of one proceeding into the other—which the petitioner cannot do in this case.

> "It is not enough that there be a remedy at law, it must be as plain and adequate, as practical and efficient to the ends of justice and its prompt administration as a remedy at equity." Jones Manual of Equity Pleading Practice, p. 9.

The defendants Perkins and Shaughnessy have notified the plaintiff that she is not an American citizen, that she is remaining in this country illegally and that she must leave this country.

The defendants Perkins and Shaughnessy *must* take steps to deport aliens illegally remaining in this country. Therefore their official allegations of the plaintiff's alienage and notice to her to leave the United States constitute an actual threat of deportation which they must be expected to prosecute unless relief is granted as prayed for. This threat of deportation remains unretracted, the defendants Perkins and Shaughnessy having from time to time merely postponed the time for taking further proceedings against the plaintiff. The plaintiff's prayer for a temporary injunction *pendente lite* was dismissed upon the defendants through their counsel, stating in open Court that no steps toward her deportation would be taken pending the outcome of this suit.

However, the absence of plain, adequate and complete remedy at law is no requirement of the Federal Declaratory Judgments Act. She is entitled to a declaration of her status regardless of any other remedy available to her. *Nashville v. Wallace*, 288 U. S. 249, 258 (Declaratory Judgment issued although plaintiff has a remedy at law in State Court).

Gully v. Interstate Natural Gas, 82 F. (2) 145, C. C. A. 5th.

Penn v. Glenn, 10 F. Supp. 483 (Ky.) (Declaratory Judgment issued although injunction denied as adequate remedy at law).

If the plaintiff's right to a Declaratory Judgment should be denied, then she would pray for injunctive relief against the defendants, as set forth in her petition; however, such injunctive relief is unnecessary if the decree of the District Court is sustained, and consequently it is not enlarged upon in this brief.

Conclusion.

In conclusion the plaintiff submits that she is a natural born citizen of the United States, that she has never lost that status, that she is entitled to all the privileges and immunities guaranteed to citizens of the United States and to a decree to that effect against all the defendants by virtue of the Federal Declaratory Judgments Act, as amended. Wherefore the plaintiff submits that the decree of the Court of Appeals should be modified so as to reverse the decree of the District Court insofar as it sustains the motion to dismiss as to the defendant Hull; and that as so modified to include all defendants, the decree declaring her to be a natural born citizen of the United States should be affirmed.

Respectfully submitted,

HENRY F. BUTLER,
Attorney for Marie Elizabeth Elg.

Investment Bldg.,
Washington, D. C.

APPENDIX A

FEDERAL DECLARATORY JUDGMENTS ACT.

(AS AMENDED.)

(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or through appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the Court, whether a general verdict be returned or not. (48 Stats. 955; amended August 30, 1935, 49 Stats. 1027: 8 U. S. C. 400).

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 454

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, PETITIONERS

v.

MARIE ELIZABETH ELG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF ON BEHALF OF PETITIONERS

1. The brief of respondent Elg, pp. 23–27, states that the present position of the Government is contrary to a "long established practice." It is further stated that the issuance of the passport to respondent Elg in 1929 was not an error, but was "in accordance with the law as then construed" as evidenced by the letter of the American Consul at Goteborg, dated June 11, 1928 (Ex. B 1–B 2, R. 9–10), and the letter of his successor, dated October 29, 1935 (Ex. B 3–B4, R. 10–12).

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These letters do suggest that respondent's difficulties are due to a change in the interpretation of certain laws and decisions. In accordance with the suggestion made by this Court in *United States* v. *Minnesota*, No. 73, this Term, decided January 3, 1939, inquiry was made of the Department of State in this connection.

A letter from Mr. Green H. Hackworth, Legal Adviser to the Secretary of State, to the Solicitor General, dated February 1, 1939, calls attention to the letter of Mr. Wilbur J. Carr, Assistant Secretary of State, to the Attorney General, dated October 7, 1931, concerning the case of Ingrid Therese Tobiassen. That letter, contained in the files of the Department of Justice, reads, so far as relevant, as follows:

> This Department has for many years uniformly held that former citizens of the United States who have been naturalized during minority in foreign States through the naturalization of their parents must be regarded as having lost their American nationality under the provision of Section 2 of the Act of Congress of March 2, 1907 (34 Stat. 1228). "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws"; also that the provisions contained in the naturalization treaties between the United States and other countries, including the

naturalization treaty of May 26, 1869, with Norway and the Protocol of the same date, are applicable to the cases of persons naturalized during minority through the naturalization of their parents, as well as to the cases of persons naturalized after attainment of majority upon their own applications. In this connection I enclose, for your information, an excerpt from a memorandum of the Solicitor, dated August 17, 1926, concerning the case of one Baldura Schmidt, a native of this country who was naturalized as a German subject through the naturalization of her father.[1] As indicated therein, this Government has insisted that persons of foreign birth who have been naturalized as citizens of the United States during minority through the naturalization of their parents should not be held for the performance of military service in the foreign countries from which they came upon the ground that, notwithstanding their naturalization in the United States, they retained their original nationality and the obligations attendant thereupon. This Department has contended that their naturalization should be regarded as complete, and that such persons should not be regarded as having a dual allegiance.

[1] We have set out in Appendix A, *infra*, with respect to the case of Miss Baldura Schmidt: (1) Instruction, Mr. Wright, to Mr. Schurman, Ambassador to Germany, September 24, 1925; (2) Mr. Olds, Asst. Sec. of State, to Mr. Parker, October 18, 1926.

Mr. Hackworth's letter continues:

> There are in the files of the Department numerous cases which were decided in accordance with the rule stated in the above quoted passage in the Department's letter of October 7, 1931, to the Attorney General. It would be impossible to find all of these cases, for the reason that most of them were merely indexed under the names of the individuals concerned. However, a number of cases have been found which, it is hoped, will be sufficient for your purposes. Reference is made to the following instructions: February 17, 1917, to the Consul General at Ottawa concerning the citizenship of William H. and George L. Depue; June 4, 1921, to the Consul General at Paris concerning Pedro Alberto de Mora; October, 1925, to the American Consul General at Winnipeg, Canada, concerning Evalou Maris; December 5, 1925, to the American Consul General at Winnipeg, Canada, concerning Ella Aileen Hall.

The instructions referred to are set forth in Appendix A, *infra*.

2. Reference is also respectfully made to Section 317 of a draft Nationality Code, *infra*, Appendix B, dealing with the naturalization of persons situated as is respondent, and providing for the elimination of the requirements of five years residence and previous declaration of intention. This draft Nationality Code was prepared by representatives

of the Departments of State, Justice, and Labor, in pursuance of an Executive Order of April 25, 1933, designating the Secretary of State, the Attorney General, and the Secretary of Labor as a committee to review the nationality laws of the United States, to recommend revisions, and to codify the laws into one comprehensive nationality law for submission to the Congress. It was signed by the three Cabinet members and submitted to the President with a letter from the Secretary of State dated June 9, 1938, and was sent by the President to Congress with a message dated June 13, 1938. This draft Nationality Code indicates the consensus of the executive departments with respect to the present status of the law, and the necessity for legislative action in connection with any amelioration of respondent's situation.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

FEBRUARY 1939.

APPENDIX A

DEPARTMENT OF STATE,
Washington, February 17, 1917.

[No. 1588]

JOHN G. FOSTER, Esquire,
American Consul-General,
Ottawa, Canada.

SIR: The Department has received your despatch No. 2069 of February 9, 1917 (File No. 130), transmitting a letter of the same date which was addressed by you to Messrs. Montgomery, Hart, Smith, and Steere, No. 939 The Rookery, Chicago, Illinois, with which was transmitted a copy of the communication of February 8, 1917, from the Canadian Under Secretary of State concerning the status and citizenship of William H. and George L. Depue, who were born at Edinburg, Indiana, in the years 1892 and 1894, respectively, of a native American father, and were residing with their father in Canada when the latter in September 1911 obtained naturalization as a Canadian citizen for the purpose of enabling him to take up a homestead in Canada. The Under Secretary of State states in his communication that these young men may be considered as having acquired Canadian citizenship through the naturalization of their father under the provisions of Section 26 of the

Canadian Naturalization Act of 1870, which reads as follows:

> If the father, or the mother being a widow, has obtained a certificate of naturalization within Canada, every child of such father or mother who, during infancy, has become resident with such father or mother within Canada, shall, within Canada, be deemed to be a naturalized British subject.

The Under Secretary of State further states that the young men must be recognized by the United States as Canadian citizens under the provisions of the first paragraph of Article I of the Naturalization Treaty between the United States and Great Britain, which reads as follows:

> Citizens of the United States of America who have become, or shall become, and are naturalized according to law within the British dominions as British subjects, shall, subject to the provisions of article II, be held by the United States to be in all respects and for all purposes British subjects, and shall be treated as such by the United States.

Your letter of February 9th, addressed to Montgomery, Hart, Smith, and Steere, together with its enclosure, is this day being sent to that firm. Enclosed herewith for your information is a copy of the Department's letter of this date to the firm mentioned.

Upon a careful consideration of the facts in the cases of William H. and George L. Depue, the Department is of the opinion that they must be held to have acquired Canadian citizenship under the provisions of Section 26 of the Canadian Naturali-

zation Act of 1870, and that their naturalization as such must be recognized by this Government under the provisions of the Naturalization Treaty between the United States and Great Britain.

* * * * *

I am, Sir [etc.],

WILBUR J. CARR,
(For the Secretary of State.)

DEPARTMENT OF STATE,
Washington, June 4, 1921.

ALEXANDRA M. THACKARA, Esquire,
American Consul-General, Paris.

SIR:

* * * * *

The first paragraph of Section 2 of the Act of March 2, 1907, provides in part:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws. * * *

It is admitted that Pedro Alberto de Mora being born abroad of an American father possessed at that time American citizenship under Section 1993 of the Revised Statutes of the United States. However, since his father, Eduardo de Mora, reacquired Cuban citizenship in 1915, and since Pedro Alberto de Mora, through the act of his father, also acquired Cuban nationality in accordance with Cuban law, the Department is of the opinion that the latter expatriated himself under the provisions of the law quoted. Accordingly he

is considered to be not an American citizen and his registration as such citizen cannot be approved.

* * * * *

I am, Sir [etc.],

WILBUR J. CARR
(For the Secretary of State).

DEPARTMENT OF STATE,
Washington, October 1925.

P. STEWART HEINTZLEMAN, ESQUIRE,
American Consul General,
Winnipeg, Manitoba, Canada.

SIR:

* * * * *

Miss Maris states in her application that she was born at Orangeville, Indiana, on February 18, 1902, has resided in Canada since April 1909, and that her father was born at Paoli, Indiana, on December 18, 1862.

In her affidavit on Form No. 213 Miss Maris makes the following statement:

> I came with my parents to reside at St. Elizabeth, Manitoba. Father was naturalized as a Canadian citizen in 1913, and I became of age in 1923, but was not certain that I should register as a citizen in 1923 but, upon learning such, I am now filing application. I have been in training to become a Registered Nurse and, after completing this course, I took the Post Graduate Course at the King George Hospital which terminated January 1925.

Since the father of Miss Maris was naturalized as a Canadian citizen in 1913, it would appear that

under Canadian law the daughter, who was then a minor, became a British subject by reason of such naturalization. Accordingly, her application for registration as an American citizen is disapproved.

I am, Sir, [etc.]

DEPARTMENT OF STATE,
Washington, December 5, 1925.

P. STEWART HEINTZLEMAN, Esquire,
American Consul General,
Winnipeg, Manitoba, Canada.

SIR: The Department has received from your office the application for registration as an American citizen executed on June 29, 1925, by Ella Aileen Hall, who states that she was born at Hartley, Iowa, on July 20, 1901, and that she last left the United States in 1908, going to Canada, where she has since remained. Miss Hall further states that her father, E. E. Hall, was naturalized as a Canadian citizen on June 22, 1912.

In her affidavit on Form No. 213 to explain her protracted residence abroad, Miss Hall states "Came as a minor to reside with my family."

Since it appears that Miss Hall's father was naturalized as a Canadian citizen on June 22, 1912, it would appear that his daughter, who was then a minor, became a British subject by reason thereof, under the Canadian law. Accordingly, her application for registration is disapproved.

I am, Sir, [etc.]

JOSEPH C. GREW
(For the Secretary of State).

DEPARTMENT OF STATE,
Washington, September 24, 1925.

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The Honorable JACOB GOULD SCHURMAN,
American Ambassador, Berlin.

SIR: The Department refers to your despatches Nos. 783 of November 4, 1924, and 823 of November 26, 1924, transmitting certain information concerning Miss Baldura Schmidt and enclosing copies of certain German laws applying to her case.

Miss Schmidt's case has been the subject of considerable correspondence with your office concerning her citizenship status, in connection with her application for registration as an American citizen executed on October 17, 1923.

Since it appears that according to German law, Miss Schmidt acquired German citizenship by virtue of her father's resumption, during her minority, of German citizenship, her application for registration is disapproved.

I am, Sir,

Your obedient servant,

J. BUTLER WRIGHT
(For the Secretary of State).

130-Sch 51141.

DEPARTMENT OF STATE,
Washington, October 18, 1926.

(In reply refer to 130-Schmidt, Baldura.)

Mr. A. WARNER PARKER,
Attorney and Counsellor at Law,
Mills Building, Washington, D. C.

SIR: The Department acknowledges the receipt of your letter of July 5, 1926, with further refer-

ence to the desire of Miss Baldura Schmidt to obtain an American passport. You express the opinion that for the reasons given in your letter and in the copy of the affidavit recently executed by Karl Schmidt, the father of Baldura Schmidt, the Department has erred in its previous decisions declining to issue a passport to Miss Schmidt on the ground that she was expatriated by the act of her father in resuming German nationality.

The Department has again given very careful consideration to the case of Miss Schmidt. In this connection it calls your particular attention to the fact that under the provisions of Paragraph one of the German Law of Nationality of June 1, 1870, a German subject who resided outside of Germany for ten years uninterruptedly without registering with a German official as a German subject lost his German citizenship. The same paragraph of the German Law of Nationality of 1870 also provided that "Loss of citizenship incurred according to this provision extends also to the wife and minor children who are under the paternal authority, provided they are with the husband or father." It appears from the facts in this case that Mr. Schmidt lost German nationality in 1910, under the provisions of the German Law of Nationality of 1870, by reason of his residence outside of Germany for a period of ten years and that such loss of citizenship extended to the wife and minor children who were under his paternal authority.

Paragraph sixteen of the German Law of Nationality of July 22, 1913, provides that "The admission to nationality or naturalization extends, provided that no reserve is made in the certificate, also to the wife and to those children who are legally represented by the admitted or naturalized per-

son in virtue of his paternal authority. Daughters who are or have been married are excepted."

It seems obvious from the facts in this case that Karl Schmidt resumed German nationality in 1923 in accordance with German law, in consequence of which German nationality was also conferred upon his daughter, Baldura Schmidt, then a minor and residing with him. The Department's opinion in this regard is substantiated by a Note from the German Foreign Office to the American Embassy at Berlin, dated October 28, 1924, in which the Foreign Office stated that Karl Schmidt again became a German citizen on February 27, 1923, and that German citizenship was thereby extended to his daughter, Baldura.

In view of the foregoing, the Department is obliged to decline to issue a passport to Miss Schmidt.

Three certificates attesting that a daughter was born to Karl Schmidt and Edith Schmidt on October 22, 1902; an affidavit of October 11, 1920, executed by Edith Kimball Schmidt concerning the birth of her daughter, Baldura, at Shirley, Massachusetts, on October 22, 1902, and an affidavit executed by Baldura Schmidt before the American Vice Consul at Leipzig on May 10, 1924, are enclosed. There is also enclosed a check for the sum of nine dollars, the amount which accompanied the application executed by Miss Schmidt in the Passport Agency of this Department in Boston, Massachusetts, on July 8, 1926. It is requested that you transmit this check to Miss Schmidt.

I am, Sir,

Your obedient servant,

ROBERT E. OLDS, *Assistant Secretary.*

(For the Secretary of State.)

APPENDIX B

REPORT TO CONGRESS CONCERNING THE REVISION AND NATIONALITY LAWS OF THE UNITED STATES

TEXT OF SECTION 317 OF THE DRAFT CODE

SEC. 317.—

(*a*) A former citizen of the United States expatriated through the expatriation of such person's parent or parents and who has not acquired the nationality of another country by any affirmative act other than the expatriation of his parent or parents may be naturalized upon filing a petition for naturalization before reaching the age of 25 years and upon compliance with all rquirements of the naturalization laws with the following exceptions:

1. No declaration of intention and no certificate of arrival and no period of residence within the United States or in a State shall be required;

2. The petition may be filed in any court having naturalization jurisdiction, regardless of the residence of the petitioner;

3. If there is attached to the petition at the time of filing, a certificate from a naturalization examiner stating that the petitioner has appeared before him for examination, the petition may be heard at any time after filing; and

4. Proof that the petitioner was at the time his petition was filed and at the time of the final hearing thereon a person of good moral character, at-

tached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and that he intends to reside permanently in the United States, shall be made by any means satisfactory to the naturalization court.

(*b*) No former citizen of the United States, expatriated through the expatriation of such person's parent or parents, shall be obliged to comply with the requirements of the immigration laws, if he has not acquired the nationality of another country by any affirmative act other than the expatriation of his parent or parents, and if he has come or shall come to the United States before reaching the age of 25 years.

(*c*) After his naturalization such person shall have the same citizenship status as if he had not been expatriated.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 454.

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, *Petitioners,*

v.

MARIE ELIZABETH ELG.

No. 455.

MARIE ELIZABETH ELG, *Petitioner,*

v.

FRANCES PERKINS, SECRETARY OF LABOR, EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, AND CORDELL HULL, SECRETARY OF STATE.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

REPLY BRIEF FOR MARIE ELIZABETH ELG.

Bowing to the suggestions of the Chief Justice, counsel for plaintiff Elg did not press his objection to the Solicitor General's request to file a reply brief for defendants Perkins and Shaughnessy; however, counsel stated to the

Court that his duty to his client required him to remind the Court that the case is before it on motion to dismiss, and the attention of the Court is respectfully directed to the rule laid down this term in *Polk* v. *Glover,* 305 U. S. 5.

By leave of the Chief Justice the plaintiff Elg is filing this reply brief.

It is not necessary to go outside the records in this Court to demonstrate there has been a change in the interpretation and administration of the law by the State Department, and that the Labor Department formerly construed and administered the law exactly as contended for by the plaintiff, until forced to change its practice in June, 1932, by the Tobiassen opinion.

The Labor Department is equally charged with the State Department in the administration of laws relating to American citizenship, and interpretation and practices of the Labor Department are of equal dignity and standing before this Court with those of the State Department.

With Reference to the State Department:

(a) The record in this case indicates, and the defendants by standing on their motion to dismiss fail to deny and tacitly admit, that there has been a change in the interpretation and administration of the law by the State Department between July 22, 1929, when passport 91 (*Ex. D,* R. 12) was issued to plaintiff in accordance with the practice explained in the letter of June 11, 1928 (*Exs. B-1, B-2,* R. 9, 10) of H. C. von Struve, American Consul at Göteborg, a man of great experience and reputation who had been in the Consular Service since 1914 (see *Who's Who in America,* Vol. XVII for years 1932, 1933; died Nov. 5, 1933) and October 29, 1935, the date of the letter (*Exs. B-3, B-4,* R. 10, 11) of Lloyd D. Yates, his successor as American Consul at Göteborg, also a man of experience and the official representative abroad of the Secretary of State, who stated "the interpretation of certain laws

and decisions as regards citizenship have undergone a change."

With Reference to the Labor Department:

(b) Ingrid Therese Tobiassen was admitted in 1929 as a natural born United States citizen, on her birth certificate: and see statements in the Attorney General's opinion on Tobiassen as to the former practices of the Labor Department (36 Op. A. G. 535).

(c) The record on file in this Court in the Reid case shows that Mrs. Barney and Mrs. Carr, appearing as *amici curiae*, were admitted in 1919 during their minority as natural born citizens, although exactly in the class of Mrs. Reid (October Term 1936, No. 352, R. Vol. 2, p. 3).

(d) Albin H. Youngquist was admitted in 1931 during his minority as a natural born citizen, although subsequently held deportable (Senate Report 1613, quoted at p. 50 of the plaintiff's main brief).

Pursuant to request of the Chief Justice for information concerning the past and present practices of the several Departments of Government in the administration of the citizenship laws and for the complete pertinent record in the *Tobiassen* case, counsel for plaintiff Elg requested the Solicitor of Labor Department by letter addressed to the Secretary, dated February 6, 1939 (copy of which is appended hereto as APPENDIX A, *infra* p. 10) and by telephone, to furnish the following data: (1) copy of letter and brief of the Labor Department submitting the Tobiassen matter to the Attorney General, (2) evidence or statement of practice of Labor Department with respect to such cases before and after the Tobiassen opinion, (3) breakdown of the figures given in letter of October 18, 1938, from Solicitor of Labor Department to Attorney General, printed as Appendix B in Government's petition for certiorari, showing approximately how many of the enumerated persons heretofore admitted to this country as citi-

zens, disposition of whose cases is awaiting decision of this case, were admitted as adults on United States passports and how many as minors on birth certificates.

In response thereto counsel was advised that the Labor Department was furnishing the Solicitor General with memorandum of T. B. Shoemaker, Deputy Commissioner, dated February 7, 1939, stating that prior to the Tobiassen opinion the Labor Department and the Immigration Bureau had adhered to the construction contended for by plaintiff, and giving other information sought in counsel's inquiries (set forth as APPENDIX B, *infra* p. 12); together with copies of letter of August 11, 1931, from the Labor Department to the Attorney General and of opinion of Solicitor for the Labor Department re. citizenship of Tobiassen. As the Solicitor General has informed counsel that he will file printed copies of the letter and opinion of August 11, 1931, as Appendix C to a Supplemental Memorandum on Behalf of Petitioners in No. 454, they are not set forth in this brief, but reference hereby is made to them.

Attention of the Court is respectfully directed to the above referred to opinion of the Solicitor for the Labor Department which supports and urges as correct the very contentions herein advanced by this plaintiff, showing that such had been the interpretation and administration of the laws by that Department. (Supplemental Memorandum on Behalf of Petitioners, No. 454, pp. 23-32.)

Counsel for plaintiff had assumed that after entry of the decree in the District Court no new evidence would be admissible in this case and consequently from that time up to and including the time of argument before this Court he has made no effort to obtain and collate further evidence of the former practices of the several Governmental Departments. As he does not have access to the official files of the Government, it is an almost impossible task in the few days permitted for the drafting, printing and filing of this reply brief to obtain such evidence.

The facts and documents above referred to clearly indicate that the former practice of the Labor Department was contrary to its present practice, which has been forced upon it by the Opinion of the Attorney General in the *Tobiassen* case, and the decision of the *Reid* case in the Ninth Circuit. They also tend to explain why the Reply Brief of Defendants Perkins and Shaughnessy in No. 454, filed by the Solicitor General in the course of argument, failed to offer any evidence of the practice of the Labor Department, but contained only some letters of the Secretary of State pertaining to several specific cases, some of which are not in point.

In an effort to obtain advice and information which would indicate that the State Department has not consistently followed its alleged practices, counsel inquired of that Department concerning certain practices generally, and certain cases specifically. The response of that Department, dated February 8, 1939, signed by R. B. Shipley, Chief, Passport Division is set forth as APPENDIX C, *infra* p. 14, and the original letter filed with the Clerk of this Court. Counsel does not concede that the alleged practices have been consistently followed, nor that they were the customary practices at the date of issuance of passport to plaintiff Elg. However, counsel submits that they do indicate an acknowledged admininstrative practice at the present time which purports to rest the retention or loss of United States citizenship upon the State Department's interpretation of the foreign law in force for the time being in any of more than 60 different countries which have legislation on citizenship, which law may be changed over night and subsequent to the date of departure from the United States of the person whose birthright is at stake.[1] The letter confirms counsel's statements in argument that under the Government's theory every American lives in jeopardy of being expatriated involuntarily by operation of a foreign law, that contrary to the decided cases expatriation of children

[1] See State Department letter, *infra*, p. 14, at 16.

can be effected by mere residence abroad, in conjunction with a foreign statute, and that American born children whose parents were *American citizens* are more susceptible to loss of their birth citizenship than those born of *alien parents*,—indeed an anomalous situation.

This letter also tends to answer the inquiries of Mr. Justice Stone concerning treaty provisions under which the plaintiff Elg might have lost her American citizenship. Although the letter describes administrative practices with respect to several foreign countries with which the United States has treaties, it makes *absolutely no reference to those treaties*, but rests the retention or loss of United States citizenship solely on the question of whether or not the person involved *acquired a foreign citizenship under the foreign law*. The only treaty mentioned is the Treaty of Trianon, and the Department acknowledges it erred in construing the effects of that treaty on Hungarian and Rumanian local law with the result that it ruled prejudicially to the citizenship rights of some of our natural born citizens who chanced to have been in those countries, until the Rumanian Foreign Office set it right. This confirms counsel's contentions in argument that the treaty with Norway and Sweden has nothing whatever to do with the question in issue in this case. (See Plaintiff Elg's main brief, pp. 29-35.)

Examination of contemporaneous construction of the Act of March 2, 1907, discloses the absence of any ruling or remarks pertaining to loss of citizenship by minors in a State Department Circular on EXPATRIATION issued April 19, 1907, citing the act involved in this case, and concluding, "So much of this instruction as relates to residence abroad is not applicable to natural-born citizens of the United States. Their status, so far as their right to the protection of this Government is concerned, is governed by existing instructions of this Department, and especially by so much of the circular instruction of March 27, 1899, as applies to them, which is appended to this instruction for your information." Under the same date instructions were is-

sued pertaining to CHILDREN OF CITIZENS BORN ABROAD, with reference to retention of their citizenship by registering at age 18 and taking the oath of allegiance at age 21. Neither in these nor in any other instruction or circular issued at that time nor up until the passport was issued to plaintiff Elg is there any reference to loss of citizenship by minors. The circular of March 27, 1899, discusses expatriation, but is silent as to minors and clearly contemplates voluntary, intentional acts on the part of adults, *sui juris*, and not under compulsion. (See Compilation of Certain Departmental Circulars Relating to Citizenship, etc., Department of State, 1925, pp. 1, 10, 11; Foreign Relations of the United States, 1907, Part 1, pp. 3-6, 9, 10.) The letter of the Chief Justice, then Secretary of State, of November 24, 1923, which counsel referred to in argument, indicates that the State Department did not then recognize the expatriation of minors for any reason. (See Compilation of Certain Departmental Circulars Relating to Citizenship, etc., p. 118; for convenience of the Court, copies of this letter have been left with the clerk, and a copy given to the Solicitor General.) Although Moore's Digest was published in 1906 (and therefore does not contain any references to decisions under the Act of March 2, 1907), Vol. III is replete with cases where the State Department has vehemently protested loss of United States citizenship by minor children, in many of which Bancroft treaties were involved. Contemporaneous constructions of the treaty and of the act, continued for many years, particularly where they consort with the equities in the case, give weight to the plaintiff's contentions. (*United States* v. *Alabama Railroad Co.*, 142 U. S. 615, 621, and cases there cited.)

The record at page 20 indicates that there are three other Elg children, younger than the plaintiff, one born in New York in 1909, and two born in Sweden in 1912 and 1915 respectively, prior to their father's return for permanent residence in 1922. All these children had American citizenship at birth, one under the Constitution, and the

younger two under Revised Statutes, Sec. 1993, which then provided:

> "Section 1993, Revised Statutes: All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

The Act of March 2, 1907, Section 6, when the foreign born Elg children attained 18 years of age provided:

> "Act of March 2, 1907, section 6: . . . all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become resident and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

It does not appear how the Departments construe the law concerning loss of citizenship of children born abroad of American parents, under facts pertaining in this case. If the two younger children retain a right of election until age 18, or 21, under Sec. 6 of the Act of March 2, 1907, then they would be in a better position than their elder sisters born in the United States; if they lose their American citizenship upon repatriation of their father, then Sec. 6 of the Act is nullified by operation of foreign law. Citizenship of the other Elg children may not be pertinent to the decision of this case, but it affords an example of the inconsistencies that may arise under the Government's contentions.

As further evidence of a change of practice by both Departments, reference is made to a publication of the For-

eign Language Information Service, an incorporated organization whose purpose is to aid the immigrant and the foreigner in this country and which works in close cooperation with the Departments of State and of Labor in all such matters. On December 14, 1932, it issued one of its customary bulletins entitled INTERPRETER RELEASE (Vol. IX, No. 43, pp. 319-324) "Concerning the Expatriation of American-Born Minors" and setting forth the changed interpretation and application of the law resulting from the Tobiassen Opinion. The first paragraph of the release states:

> "For many years it has been the general belief that birth in the United States conferred a type of citizenship that could not be lost except through some affirmative act of the native American himself. According to a recent ruling by the Attorney General for the United States, however, such is not always the case; he holds that minors, born in the United States, may under certain circumstances be deprived of their citizenship through the acts of others over which they have no control."

On page 323 the release describes two cases where the State Department had, consistent with the rule declared in the *Tobiassen* case, declined to issue passports to persons deemed to have lost birth citizenship during minority. It is submitted that had this practice been customary with the State Department prior to the Tobiassen ruling the Foreign Language Information Service, an organization of long standing, enjoying most friendly and close relationship with the Departments involved, would have known of such practice, would not have referred to it as a change in the interpretation of the law and would not have cited as novel and unusual such cases concerning loss of citizenship. This publication is available at the Library of Congress, call No. JK 1751.F6 but for convenience of the Court counsel is obtaining copies which will be left with the clerk.

Respectfully submitted,

HENRY F. BUTLER,
Counsel for Marie Elizabeth Elg.

(Copy)

APPENDIX A.

Telephone District 2409
Cable Address "RELTUB"

Law Offices
CHARLES HENRY BUTLER
HENRY F. BUTLER
W. CAMPBELL ARMSTRONG

Investment Building
Washington, D. C.

February 6, 1939

The Secretary of Labor
Washington, D. C.

Dear Madam Secretary:

Last Friday in the course of the argument before the Supreme Court of the United States in the consolidated cases of *Perkins et als* v. *Elg* and *Elg* v. *Perkins et als*, the Chief Justice stated he desired all evidence of previous practice of the several departments in connection with the recognition or loss of American birth citizenship in minor children to be before the Court and to that end authorized me to file a reply brief, submitting such data.

Will you be good enough to furnish me with the brief of the Labor Department and other pertinent material in connection with submission to the Attorney General of the Ingrid Therese Tobiassen matter which became the subject of his opinion as reported in 36 Ops. A. G. 535.

Will you also be good enough to advise me what was the customary procedure of the Labor Department and the Immigration Service in admitting to the United States during their minority persons who had acquired United States citizenship by birth in this country, but who had been taken abroad by their parents, who had thereupon become naturalized or repatriated in a foreign country.

Will you also be good enough to advise me whether prior to the Tobiassen opinion in 1932 it was the practice of the Labor Department and Immigration Service to deport as aliens persons admitted to the United States (in the position of Miss Elg and Miss Tobiassen) either on birth cer-

tificate during minority or on passport or otherwise, but whom it was subsequently discovered had resided during minority with parents abroad and whose parents had or may have acquired a foreign nationality as a result of which the persons in question may have had conferred upon them during minority such nationality.

You will appreciate that as I have no access to the official files of your Department, it is impossible for me to refer to specific cases and I must therefore inquire generally in the hope that you will give me the information I desire.

Very respectfully,

HENRY F. BUTLER

HFB:FH

Certain further inquiries indicated on page 3 of the foregoing brief were made orally and are answered in the Memorandum of the Deputy Commissioner, *Appendix B*.

APPENDIX B.

U. S. DEPARTMENT OF LABOR
IMMIGRATION AND NATURALIZTION SERVICE
WASHINGTON

Address Reply to Commissioner of Immigration and Naturalization and Refer to File Number 23/22894

February 7, 1939.

Memorandum:

Prior to June 16, 1932, when the Attorney General rendered his opinion in the case of "Citizenship of Ingrid Therese Tobiassen" (36 Op. Atty. Gen. 535), it was the view of the then Bureau of Naturalization, and it so advised members of the public when such cases arose, that retention of citizenship was a personal matter and expatriation could not be accomplished through the act of the father. This view was based upon a dictum contained in the opinion of the Supreme Court in United States v. Wong Kim Ark (169 U. S. 649, 704). The particular language involved is as follows:

> "Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by Congress, 'the right of expatriation is a natural and inherent right of all people,' . . . Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful."

Upon the rendition of the Attorney General's opinion in the Tobiassen case, the administrative view upon the subject was modified to conform to the Attorney General's opinion.

Careful effort has been made to locate and identify circular notifying the Field of change of practice with regard to the admissibility of children on birth certificates, but it

appears that the copy of the Attorney General's opinion was sent without any accompanying comment.

With respect to the figures showing the number of cases, they are only an approximation, and it is not possible to even approximate the number who have been readmitted on passports or birth certificates.

Attached hereto are copies of letter of Aug. 11, 1931, from this Department to the Attorney General and Solicitor's memorandum of same date, re citizenship of Ingrid Therese Tobiassen.

(Sgd.) T. B. SHOEMAKER,
Deputy Commissioner.

Enclosures.

The enclosures above referred to, being the letter of Aug. 11, 1931, and Solicitor's Memorandum of same date, are not printed in this brief, but are set forth in Supplemental Memorandum on Behalf of Petitioners in No. 454 as Appendix C, pp. 21-32, to which reference is hereby made.

APPENDIX C.

Address official communications to
The Secretary of State
Washington, D. C.

DEPARTMENT OF STATE
WASHINGTON

In reply refer to
130-Skonnord, Eigil Norman

February 8, 1939.

Mr. Henry F. Butler,
Investment Building,
Washington, D. C.

My dear Mr. Butler:

The Department has received your letter of February 7, 1939, in which you refer to the cases of Irma Ocskay and Helmer Larsson or Lawson. Your letters of February 6, 1939, have also been received in which you refer to the case of Mr. Eigil Norman Skonnord. You request information concerning the cases mentioned in connection with your desire to obtain information relative to the citizenship status of a minor child whose father is naturalized as a citizen of a foreign country or who reacquires the nationality of a foreign country of which he has formerly been a citizen or subject.

The Department's records are confidential and it is contrary to its established practice to furnish information therefrom except upon the request of the person concerned, his duly authorized agent, a near relative, or a court in which a cause of action is pending in connection with which the information is desired.

However, in view of the purpose for which you desire the information it may be stated that neither the case of Helmer Larsson nor the case of Eigil Norman Skonnord involved any citizenship question similar to that concerning which you desire information.

Cases have arisen where children were born in the United States of British parents and accordingly possess British citizenship under British law and American citizenship under the laws of the United States. Subsequently, the fathers of such children were naturalized as American citi-

zens but since the children already possessed American citizenship, there was no change in the nationality of the child in so far as the laws of the United States were concerned nor under the laws of Great Britain since the child had not been naturalized as an American citizen. In such cases where the fathers proceeded to Canada and were naturalized as Canadian citizens, the children were not naturalized in Canada as a result of the fathers' naturalization since they were regarded as already possessing British nationality. Therefore, the Department held in such cases that the child had not been naturalized as a citizen of a foreign country and accordingly had not lost American citizenship.

A similar situation arises with regard to Italian nationals but with a different result from a legal standpoint. A child who is born in the United States of an Italian father is born with dual nationality but under Italian law if the father is naturalized as an American citizen the child loses Italian citizenship notwithstanding the fact that under the laws of the United States the child is not naturalized as an American citizen due to the fact that the child already possessed American citizenship by reason of his birth. Under this state of facts, if the Italian father takes the minor child and returns to Italy and is naturalized as an Italian citizen under the laws of Italy, his child, if residing with him, is also regarded as becoming a naturalized Italian citizen since prior to the father's reacquisition of Italian nationality the child did not possess such nationality; in such a case the child is regarded by the Department as having been naturalized in a foreign country pursuant to its laws and considered to have lost American citizenship through the operation of the first paragraph of Section 2 of the Act of March 2, 1907.

Cases of persons of Swedish or Norwegian origin have also arisen and the question of whether a child who possessed American citizenship by birth in the United States would be regarded as having lost American citizenship through the acquisition or reacquisition of Norwegian or Swedish nationality on the part of the child's father would depend upon whether the child possessed Norwegian or Swedish nationality at the time of the acquisition or reacquisition of such citizenship on the part of the father; or in other words, whether the child was actually naturalized as a Swedish or Norwegian citizen at the time of the reacquisition or

acquisition on the part of the father. The laws of Sweden and Norway operate in the same manner as the laws of the United States in that a child who possesses Swedish or Norwegian nationality loses such nationality if by virtue of the father's naturalization in the United States the child becomes a citizen of the United States. However, the laws of both countries have contained from time to time various other provisions under which a child born with Swedish or Norwegian nationality might lose such nationality through the act of the father. For example, such a child under Swedish laws in effect up until 1925, even though born in the United States, would lose Swedish citizenship by reason of the father's loss of such citizenship through residence outside of Sweden for a period of ten years or under the laws of Norway if the father established a permanent residence in a foreign country.

With reference to the case referred to in your letter which involved the application of the Rumanian Law of 1924, it may be stated that a certain case has come to the attention of the Department in which a child was born in the United States prior to the World War of a Hungarian father who was a native of that part of Hungary which became Rumanian territory as a result of the World War. Such a child possessed at birth dual nationality. After the War the father and the child proceeded to Rumania and established their residence there. In 1924 the Rumanians enacted a law which provided for the making of a list of all persons born in Hungarian territory which had been ceded to Rumania who were to be recognized as Rumanians. Under the Rumanian law the minor children of such persons were also to be recognized as Rumanians. This Department when first investigating these cases was advised that the Rumanian Act of 1924 was a naturalization statute and that persons who were accorded Rumanian nationality thereunder were naturalized as Rumanians. Accordingly, it held that in such cases the American born child whose father had had his name placed upon the Rumanian nationality list was naturalized as Rumanian and lost his American citizenship. Subsequently, as a result of a further investigation of the foregoing matter and of correspondence conducted between this Government and the Government of Rumania, an official communication was received from the Rumanian Foreign Office in which this

Department was informed that the inscription in the nationality list under the terms of the Act of 1924 was not a formality imposed by law for the acquisition of the right to Rumanian citizenship, but only an establishment of an existing right which the persons concerned acquired *ipso facto* through the operation of the Treaty of Trianon. As a result of this information, the Department reached the conclusion that the American born child of a Rumanian father whose name had been placed upon the Rumanian nationality list under the terms of the Rumanian Act of 1924 above referred to could not be regarded as having been naturalized as a Rumanian citizen since the according of Rumanian citizenship to such a child was a mere substitution of Rumanian for Hungarian nationality and in such cases the child was not considered by the Department to have lost American citizenship.

Sincerely yours,

R. B. SHIPLEY,
Chief, Passport Division.